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The Merger of the Law Society of Massachusetts with the Massachusetts Bar Association

Proposed Complete Revision of Rules of the Supreme Judicial Court Submitted by the Court to the Bench and Bar for Comment and Suggestions Before Final Action.

Issued by The Massachusetts Bar Association

53 State Street Boston 9, Mass.

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Executive Committee

1950 - 1951

At a meeting of the Board of Delegates of the Massachusetts Bar Association held on June 3, 1950 the following persons were chosen to serve on the Executive Committee for one year in addition to the President, Treasurer, Secretary and Assistant Secretary *ex officiis:** Fletcher Clark, Jr., *Middleboro;* Ines DiPersio, *Belmont;* Reuben Hall, *Newton;* Thomas M. A. Higgins, *Lowell;* Hon. Frederick M. Myers, *Pittsfield;* Fredric S. O'Brien, *Lawrence;* Bennett Sanderson, *Boston.*

MASSACHUSETTS LAW QUARTERLY

EDITOR

Frank W. Grinnell

Editorial Board

George K. Black, *Boston* Hartley C. Cutter, *Boston*

Alfred L. Daniels, *Lawrence*

* Since the merger Hon. Francis X. Reilly and Joseph Schneider, respectively president and secretary of the Law Society, have been sitting with the Executive Committee at its monthly meetings.

THE MERGER OF THE LAW SOCIETY OF MASSACHUSETTS WITH THE MASSACHUSETTS BAR ASSOCIATION

Welcome

With a Little History.

We welcome, to our ranks of membership and readers, all the members of the Law Society of Massachusetts. Also we welcome to the Editorial Board of the "Quarterly", Hartley C. Cutter, Esq., the Editor-in-Chief, during the past three years, of the Law Society Journal.

The Journal was established in 1929, shortly after the organization of the Law Society. Joseph Cinamon was the able and devoted editor for the first seventeen of its twenty years of useful existence. The last issue of the "Journal", the publication of which now ceases, was the twentieth anniversary issue of December 1949.

We are glad to state that Mr. Cutter has already been of assistance in connection with this special issue of the "Quarterly", with his advice and by providing articles which he had collected for the "Journal", two of which are printed herein.

We call it a "special issue" for two reasons—first, to announce and explain the merger to our members, and second, because it contains the draft of a complete revision of the rules of the Supreme Judicial Court submitted by the court in these pages for comment and suggestion before final action by the court. We hope you will read the draft and submit your suggestions as requested. This practice of the court of consulting the bar, who represent clients, is the modern practice in rule-making as illustrated by the course followed by the Supreme Court of the United States in connection with the Federal Rules. We are aware that all lawyers do not like all of the Federal rules, but their joint preparation was one of the greatest professional movements in American legal history and the bar of the country appears, gradually, to have accepted them with approval.

Perhaps a little legal history of bar organization may interest our members. Lawyers, and particularly New England

lawyers, have always been, and still are, we are happy to say, individualists. The "Law Society Journal" for December 1949 reprinted an editorial by Cinamon in which he said,

> "Lawyers, from the very nature of their profession, have less of the clan instinct than perhaps any other calling. They find themselves a great deal on opposite sides of causes and the clan instinct is not so likely to be found among them . . . but concerted action on the part of lawyers is of as much value to them as such action is to any other occupation or profession. An individual's voice may be but a whisper but many whispers in chorus soon become sufficiently loud to be heard."

We agree, but balance the statement, with another, with which we feel sure Cinamon would have agreed, that individual thinking, as a matter of human nature, always precedes collective thinking, whether in the community as a whole or in particular organizations. Charles Warren's "History of the American Bar" demonstrates this, as does our own legal history in Massachusetts. In the American colonies the bar of trained individuals developed before the courts, who were composed mostly of laymen, often well educated and receptive enough to learn from the ablest lawyers. Space will not permit the detailed story, but, in the early 18th century when the economic conditions of growing Massachusetts needed a trained bar and better courts, the first outstanding leader of the bar appeared about 1722 from Connecticut in the person of John Read who trained both the bench and his colleagues at the bar in the value of legal study, formal procedure and restraint of their habitually verbose tendencies. In this he was supported by Auchmuty and others (see XXVI M.L.Q. Special No. 2, Jan. 15, 1941, p. 13).

So far as organization is concerned, until 1836, lawyers were classified as "counsellors" or "attornies" a division somewhat similar (but with differences) to the ancient and present division of the English bar into "barristers" and "solicitors". In 1836 the Revised Statutes abolished the distinction between "counsellors and attornies".

We have before us as we write a photostatic copy of the original records of the "Bar" of Franklin County from 1812

to 1835 and the original record of the "Fraternity of the Suffolk Bar" from 1836 to 1841 signed, first by Charles P. Curtis and then by George T. Bigelow (later Chief Justice) as secretary and treasurer. This "Fraternity" took over, under the new statute, from the former organization of "The Suffolk Bar" (limited to "counsellors"). The disposition of the funds of the earlier organization resembled the establishment of the "Law Society Scholarship Fund" hereinafter described by President Sears as one of the incidents of the present merger. In 1836 the funds of the "Suffolk Bar" were turned over by the "Fraternity" to the Social Law Library (established in 1804),* which, in 1836, was the principal collection of legal literature in this vicinity. With great law libraries now within our reach, the Law Society fund forms a fitting nucleus for future expansion in amount to be used for the assistance of students in legal education.

The expressed purposes of bar organizations have all been substantially similar, differing only slightly in their phraseology. All of them, except that in Philadelphia (the oldest in the country) until about 1870, were short lived. The purpose of the modern permanent movement for bar organizations was partly to "protect" lawyers, and the standards of the profession, but its primary purpose which caused, explains and justifies, its permanence and expansion has been, and is, the protection of the public interest in the administration of justice. The story, commonly forgotten now, began in New York in the late sixties when the bench and bar had reached a low point in degradation during the Tweed regime following the Civil War. The Bar Association of the City of New York was organized in 1870 for the public purpose of driving corrupt judges from the bench—the immediate impulse centering on the brazen scandals connected with the Erie Railroad. The individual leaders in the movement were Samuel J. Tilden (who thus started on his public career), Dorman B. Eaton (whose attempted assassination took place the night before the first organization meeting) and others. An account of that meeting by one of the original members will be found in V Mass. Law Quarterly No. 4 for August 1920. The worst of the

* For a brief story of the Social Law Library see X M.L.Q. No. 3, May 1925, p. 48.

corrupt judges were eliminated by impeachment or forced resignations.*

Within a few years, thereafter, local associations were organized in a number of the larger cities—the Boston Bar Association being one of the earliest. In 1878, under the lead of Hon. Simeon E. Baldwin of Connecticut, the American Bar Association was organized. Starting with about three hundred members, it now has over forty thousand. This was followed, before the turn of the century, by the organization of state bar associations, the Massachusetts Bar Association joining the procession in 1909 with Hon. Richard Olney as its first president.

All organizations with many members are cumbersome in their operation because of the mere weight of numbers and, frequently, there has been, and is, misunderstanding as to their activities and service, but, whatever the faults and mistakes of organization, or leadership, their useful service has been continuous with the usual ups and downs common to all human institutions.

Most lawyers today are largely unconscious of the benefits which they receive from their service. By far the greatest good is indirect and the history is unknown or forgotten. This is true of the work of associations on the local, state and national level.

Among the various purposes of a bar magazine is that of reminding the bench and bar of their own history and explaining its constant, and often immediate, bearing on their own lives and practice. A recent illustration of this service is the fact that every married lawyer, and all his married clients who pay taxes, can split their federal income tax by joint returns; but they probably do not know that the act of Congress allowing this is solely the result of the work of the American Bar Association and its able and hard working taxation section. A

* Anyone who is interested in some of the details of the conditions will find them vividly described in three articles in the *North American Review;* one entitled "The Judiciary of New York City," in the number of the *Review* for July, 1867, page 148; one by Mr. Charles F. Adams, in the *Review* for April, 1871, page 241, entitled "An Erie Raid"; and another by Mr. Albert Stickney, in the same number entitled "The Lawyer and his Clients," page 392. (See also "High Finance in the Sixties"). The powerful caricatures of the bench and bar and of the "Tweed Ring", by Thomas Nast, which broke the "Ring" are reproduced in Reynolds' "Life of Thomas Nast."

long list of changes in Massachusetts since 1870, by statute or otherwise, which have made life more convenient for lawyers and enabled them to serve their clients better could be made as illustrating the results of the service of our various bar associations.

With appreciation of the vision and cooperative effort of the officers and members of the Law Society, of its president, Honorable Francis X. Reilly, its secretary, Joseph Schneider, its governing board, and our own president, in connection with the merger, we close with the word "Welcome".

FRANK W. GRINNELL, *Editor*

THE STORY OF THE MERGER

This story is told in the following letter of President Sears.

October 19, 1950

To the Members of the Law Society of Massachusetts:

During the summer months I held several conferences with the officers of the Law Society of Massachusetts in which we discussed the advisability and desirability of consolidating the Society and the Massachusetts Bar Association. We all came to the definite conclusion that a consolidation would strengthen the bar of Massachusetts and with the increased membership resulting therefrom, plus a concerted vigorous drive for new members, we had justifiable hopes of obtaining a membership representing at least 80 per cent of the lawyers actively engaged in practice in Massachusetts.

Following these discussions the executive committee of the Law Society met and unanimously voted in favor of consolidation. Thereafter, as you know, the entire membership of the Law Society was polled on the question and the results disclosed that the members were better than 10 to 1 in favor of the plan. Accordingly, another meeting of the executive committee was held and the president of the Society was directed to appoint a committee to act with a committee appointed by

the Massachusetts Bar Association to the end that the plan for consolidation might be consummated. It was further voted by the executive committee of the Law Society that the funds on hand with the treasurer, now amounting to slightly over $4,000, be transferred to the Massachusetts Bar Association with the proviso that at least $4,000 of the fund be used by the Association to establish a scholarship fund to be ever known as "The Law Society Scholarship Fund". In this way the name of the Society is to be perpetuated. It is hoped that from time to time additional money will be available to increase the amount of this fund.

Following the meeting of the executive committee of the Society, the Board of Delegates and executive committee of the Massachusetts Bar Association met, approved the proposals as outlined above, and under Article I of its by-laws voted to admit as members of the Massachusetts Bar Association all Law Society members who are not already members and who are certified by the Secretary of the Law Society as members thereof, without the requirement of payment of dues for the current year 1950. If for any reason any member of the Law Society does not wish thus to become a member of the Massachusetts Bar Association he should notify the Association promptly before November 1 so that we may know how many new members we are to have for the mailing list of the next issue of the Massachusetts Law Quarterly, possibly in November, to which you will be entitled as a member without extra charge. We have to decide in advance of publication how many to print.

It is the sincere hope of the officers of both associations that all members of the Law Society who have not, heretofore, been members of the Massachusetts Bar Association will continue their memberships in the Association in the years to come. The annual dues are $2 per year for the first three years after admission to the bar and $5 per year thereafter. Bills will be sent to all members in January. In order that bills and our records may be made out correctly kindly state on the enclosed postal card for our records the date of your admission to the bar, as well as your name and present mailing address.

At an early date the officers of the Law Society will petition for dissolution. It is the intention of the officers of the

Massachusetts Bar Association to carry on the excellent work accomplished by the Law Society during its existence since 1928, and we welcome the many members of the Society who contributed generously of their time and efforts toward making the aims and accomplishments of the Law Society a real success.

Sincerely yours,

S. P. SEARS
President
Massachusetts Bar Association

THE COMING INDEX

As early as possible in 1951, after the completion of Volume XXXV, a general index to the Massachusetts Law Quarterly from 1915 to 1950 will be issued to all members of the Association.

The "Quarterly" is cited in the Annotated Statutes and in Shepard's citations and the thirty-five volumes contain reprints of most of the reports of legislative committees and special commissions, of the twenty-six reports of the Judicial Council, reports of bar committees and contributed articles containing the history of, and reasons for, many statutes (under which the bar is now practicing often without knowledge of such history and reasons), proposals for statutory and other changes, as well as discussions of decisions, constitutional and other legal history and problems. In view of the frequent necessity of the study of such history by the bench and bar in connection with the decisions of cases and the development of our law (state and national) this index will, if preserved within reach, prove convenient for ready reference in practice. All the county law libraries have complete sets of the "Quarterly". *

* A brief account of earlier legal periodicals in Massachusetts since 1815 and of the origin of the "Quarterly" which grew out of the reception by the bar of the reports of the Association on legislation from 1910 to 1915 and a suggestion by the late Dean Wigmore, in the Illinois Law Review, of the need of a state law review, will be found in our issue for September 1950 (pp. 18-19).

THE NEXT ISSUE

The next issue, the regular December number, will appear about the end of the month and, as usual, will contain the annual report of the Judicial Council (the 26th) with reports requested by the legislature on various bills referred to the Council and other discussions and recommendations relating to courts, procedure and practice.

THE LIBRARY AT OUR HEADQUARTERS

We call the attention of our members to the headquarters of the Massachusetts Bar Association at 53 State Street, Boston, where we have a library of Massachusetts books which members are invited to use.

Proposed Complete Revision of Rules of the Supreme Judicial Court Submitted by the Court to the Bench and Bar for Comment and Suggestions Before Final Action.

Introductory Note

For some time the court has been preparing a revision. A draft revision relative to records on appeal submitted by members of bar association committees was submitted to the bench and bar, at the request of the chief justice, in the "Massachusetts Law Quarterly" for April 1949 (pp. 9-18) and in the "Bar Bulletin" for May and June 1949. The reply postal card response, as stated in the "Quarterly" for October 1949 (pp. 4-5) showed 582 in favor, 6 favoring in part and not favoring in part and 19 opposed. The cards and letters contained helpful suggestions of detail. In the light of those and other suggestions the court has now completed a draft and, following the course pursued by the superior court in 1931 (when the annotated

superior court rules were prepared*) now submits them for comment and suggestion which may be sent to the editor at the Association headquarters, Room 622, 53 State Street, Boston 9 or directly to the chief justice or any other member of the court.

Editor

PROPOSED RULES.

RULES FOR THE REGULATION OF PRACTICE BEFORE THE FULL COURT.

The Record.

1.

Number of Copies and Specifications.

In addition to the number of copies of the record of the court below required by G. L. (Ter. Ed.) c. 231, § 135, as amended, the clerk or other appropriate official of the court below shall transmit to the full court fifteen copies thereof. Copies of the record of the court below shall satisfy the following specifications, unless the court or a justice shall otherwise order. They shall be printed upon opaque paper having a dull surface, in clear type not smaller than 11-point. The width of the type page shall not exceed five inches. The page shall be eight and three-eighths or eight and one-half inches in width and ten and three-fourths or eleven inches in height. The width of the back margin, from the type page to the center fold, shall not be less than one and five-eighths inches. Copies shall be firmly bound at the left by saddle-wiring, side-wiring, or sewing. If side-wired or sewed, a strong paper cover shall be used. No ribbon shall be used. Copies shall bear a printed indorsement showing the name of the case and the nature of the document. When a record relates to two or more cases or to more than two parties, the record shall indi-

* See 16 M.L.Q. No. 5, February, 1931.

cate the case to which each paper belongs and by whom it was filed. Copies and other papers for the full court shall not be folded.

2.

Designations and Counter Designations of Records On Appeal or Report in Equity, or Probate, Certiorari, or Mandamus Proceedings.

(A) Upon appeal or report in equity, or probate, certiorari, or mandamus proceedings, it shall be the duty of a party charged with ordering the printing of the record to file with the clerk of the trial court a designation wherein he shall list every paper or part of a paper on file in the case necessary to a full presentation of all questions of law intended to be raised before the full court. If no evidence is to be reported, he shall file said designation with his appeal or within fifteen days after the filing of the report or the filing of any report of material facts found by the trial judge, whichever last occurs. When evidence is to be reported, the designation shall also list the portions of the transcript, and shall set out any condensation of portions of the transcript, which such party desires to be printed, and such party shall not later than fifteen days after the filing of the transcript of the testimony, or of the report, or of any report of material facts found by the trial court, whichever last occurs, file such designation.

(B) Each other party may likewise file a counter designation in which he may similarly designate any paper or part of a paper on file and any portions of the transcript or condensations thereof not already designated as he desires to have printed. All counter designations shall be filed not later than fifteen days after the filing of the designation, the report, the transcript of the testimony, or the report of material facts, whichever shall be filed last.

(C) Each party who files a designation or counter designation shall mail or deliver a copy thereof to each other party not later than the day of filing and the party charged with the duty of filing the transcript shall likewise not later than the day of filing mail or deliver notice thereof to each other party and shall promptly thereafter file a certificate of such notice with the clerk of the trial court.

(D) No colloquies or other matter shall be included in a designation unless essential to the issues before the full court. Designations shall be by page and line of the transcript.

(E) When the designations of all parties have been filed or the times for filing have expired, the clerk shall notify the trial judge, who shall have the final determination as to all matter to be printed. He shall approve or disapprove any condensation of testimony, and may order to be printed any matter not designated or any testimony a condensation of which he disapproves and to be omitted any designated matter he deems immaterial. If he orders any matter omitted or approves the condensation of any testimony, a party deeming himself aggrieved may print as an appendix to his brief any testimony omitted or to the condensation of which he objects. If no order relative to the matter to be printed is made by the trial judge within thirty days after the date of the said notice by the clerk, the failure to make such order shall be the equivalent of an approval by him.

(F) The time for doing any act prescribed by this rule may be extended or restricted by order of the trial court, which may make any appropriate order for expediting the case. Failure to do any act herein prescribed shall not require dismissal of the appeal or of the report but shall be ground for such orders as the trial court or the Supreme Judicial Court shall deem appropriate which may include dismissal.

(G) The full court may in its discretion require the transcript of the testimony to be delivered to it by the clerk in whose custody it is, and may make such use of the transcript as it deems proper.

(H) If the full court finds that any portion of the record unnecessary to a proper presentation of the case has been incorporated at the instance of any party, the whole or any part of the cost of printing may be ordered to be paid by the offending party.

3.

Joint Designations.

In place of compliance with the provisions of Rule 2 the parties may file with the clerk of the trial court a joint designation or condensation or both approved by the trial judge

setting forth the matter they desire to be printed in the record for the full court, and to be filed within the time permitted by Rule 2 for filing the designation of an appealing party.

4.

Agreed Record On Appeal.

In place of compliance with the provisions of Rule 2 the parties in a case to be heard on appeal may prepare, and the trial judge may approve, an agreed record in the form of a statement setting forth only such pleadings, facts, and documents as are essential to the issues to be presented to the full court. The statement shall be filed in duplicate with the appeal, or at such other time as may be ordered by the trial court. Upon the filing of the statement the clerk of the trial court shall forthwith send one copy to the trial judge, who shall be deemed to have approved it if within thirty days of such filing he does not notify the clerk that he disapproves it. Should the trial judge disapprove the statement, the clerk of the trial court shall forthwith notify all parties by mail. Thereafter the parties may proceed under Rule 2 or Rule 3 except that the transcript and the designation need not be filed sooner than fifteen days from mailing the notice of disapproval. In all cases where a statement is approved only such statement shall constitute the record to be transmitted by the clerk of the trial court to the clerk of the full court for the Commonwealth.

5.

Exhibits.

(A) Upon appeal or report in equity, or probate, certiorari, or mandamus proceedings, under Rules 2, 3, or 4, if the trial judge, after hearing the parties, certifies that the reproduction of the exhibits in the record would entail burdensome and unwarranted expense or would be impracticable, the exhibits need not be so reproduced but may be presented to the full court at the time of argument or of submission on briefs. Upon making the certificate the judge shall make such orders as he deems necessary for the preservation and presentation of the exhibits to the full court. The certificate shall identify the exhibits and together with any orders made in connection with its issuance shall be reproduced in the record.

(B) In actions at law exhibits may be incorporated by reference in the bill of exceptions or report.

6.

Leave for Report of Evidence in Supplemental Record.

In an appeal where there is a report of the material facts found by the trial judge, and the appealing party does not choose to include in the record for the full court the reported evidence, any other party, upon motion to the trial judge, may be accorded leave to have the reported evidence printed in a supplemental record at his expense but, in the discretion of the full court, as a taxable cost, the testimony and any exhibits to be subject to the provisions of Rules 2 and 5, respectively.

7.

Notice of Completion of Record.

Upon the payment of the balance due to the clerk of the trial court for the preparation of the papers and copies of papers for transmission to the full court, as prescribed in G. L. (Ter. Ed.) c. 231, § 135, as amended, or when it shall be ascertained that no balance is due, it shall be the duty of the said clerk to notify all other parties of the completion of the record.

8.

Transmission of Docket Entries.

In every case other than one subject to Rule 4 it shall be the duty of the clerk of the trial court to transmit with the record to the full court an attested copy of the docket entries.

9.

Notice of Entry.

Upon the entry of a case in the full court, the clerk shall give written notice of such entry and of the number of the case to counsel for parties other than the party entering the case.

10.

Cases Not to Be Argued Before Certain Time.

A case shall not be argued at a sitting beginning sooner than the forty-fifth day after such entry except by order of the full court or a justice.

11.

Miscellaneous.

In these rules where any action is called for by the trial judge, in case of his disability, death, or resignation another judge of the same court may act in his stead. In these rules the word "clerk" where referring to the clerk of the trial court shall include "register" and "recorder." Where in these rules there is a reference to printing, the record may be prepared in such other manner as may be ordered by the full court or a justice.

Briefs and Arguments.

12.

No Oral Argument Without Brief Except by Leave of Court.

No oral argument shall be heard, except by special permission of the court, in behalf of a party for whom briefs have not been filed as provided in this rule.

13.

Specifications of Briefs.

Briefs shall satisfy the following specifications. They shall be printed upon opaque paper having a dull surface. The text shall be in clear type, not smaller than 11-point, with 3-point leads between lines; but indented quotations may be set without leads, and in footnotes 10-point type with 1-point leads between lines may be used. The width of the type page shall not exceed four and one-sixth inches. The page shall be eight and three-eighths or eight and one-half inches in width and ten and three-fourths or eleven inches in height. The width of the back margin, from the type page to the center fold, shall not be less than two inches. Briefs shall be firmly bound at the left by saddle-wiring, side-wiring, or sewing. If side-wired or sewed, a strong paper cover shall be used. No ribbon shall be used. Briefs shall bear a printed indorsement showing the number and name of the case, and the nature of the document. Briefs shall not be folded.

Briefs not in substantial compliance with these rules shall not be received, unless the full court or a justice shall otherwise order.

14.

General Requirements for Briefs.

Briefs shall bear the printed signatures of individual counsel, to which firm names may be added, and shall contain the points and authorities upon which the party relies, and his argument upon them. When the construction or effect of a statute is drawn in question, its text, so far as material, shall be set forth. Facts or evidence relied on shall be referred to by the page of the printed copy of the record. Massachusetts Reports between 17 Massachusetts and 97 Massachusetts shall be cited by the name of the reporter. Briefs which are more than thirty-two pages in length, exclusive of any appendix, shall be preceded by a subject index of the matter in the brief and by an alphabetically arranged table of cases, and a table of the statutes cited, with references to the pages where they are cited.

15.

Times for Filing Briefs.

(A) The brief of the party entering the case in the full court shall be filed not later than thirty days before the date of the next subsequent sitting at which the case may be argued. The briefs of other parties shall be filed not later than fifteen days before the date of such sitting. Each party shall file with his brief a certificate of mailing or delivering a copy to counsel for each other party. Not later than Wednesday before the first day of the sitting at which the case could be argued, any party may file a brief in reply and a similar certificate. Twenty-five copies of each brief shall be filed.

(B) No briefs shall be filed at other times than herein provided without an order of the full court or a justice.

16.

Submission on Briefs.

The full court at any time will receive briefs in cases submitted by the parties without oral argument. If at the time of a submission the full court is not sitting in the county where the case is pending, the clerk shall transmit the copies of the record and the briefs to the clerk of the Supreme Judicial Court for the Commonwealth.

Quorum.

17.

Other Justices May Participate Without Reargument.

Whenever the justices before whom a law question has been heard so desire, others of the justices may be called in to take part in the decision, upon a perusal of the record and briefs, without reargument.

18.

Justice May Review Own Ruling in Certain Cases.

No justice shall sit on the hearing of any proceeding in the nature of a review of any judgment, decree, order, or ruling made by him; provided, however, that this shall not apply where it is necessary to secure a quorum or where the other justices of the court shall be equally divided in opinion.

Oral Arguments.

19.

Length.

All arguments before the full court shall be limited to thirty minutes on each side, unless for good cause shown the court shall allow further time; and, when more than one counsel are to be heard on the same side, the time may be divided between them as they may elect.

20.

No Oral Argument By An Attorney Who Has Been a Witness Except By Leave of Court.

No attorney shall be permitted to take part in the argument of a case in which he has been a witness for his client, except by special leave of court.

Establishment of Truth of Exceptions.

21.

Requirements for Petition and Notice.

Whenever a party seeks to establish before this court the truth of any allegations in a bill of exceptions, which a judge has refused to allow and sign, he shall, within twenty days after notice of such refusal, file his petition and four copies

thereof, the petition to be verified by affidavit, setting forth in full said allegations, and all facts material thereto, in the court of the county in which the exceptions would by law have been entered, if duly signed and allowed; and shall, before filing his petition, give notice thereof to the adverse party, by delivering a copy thereof to him or his attorney of record. And no party shall be allowed to establish the truth of any such allegations in this court, if he has failed to comply with this rule.

Felony Appeals.

22.

Preparation of Papers By Clerk.

In appeals under G. L. (Ter. Ed.) c. 278, §§ 33A to 33G, inclusive, as amended, the clerk shall prepare and transmit to the Supreme Judicial Court for the use of the Chief Justice one copy of every paper on file in the case, except papers used in evidence only; of all papers made part of the case or referred to in the assignment of errors, or so much thereof as is necessary fully to present the question of law; of the summary of the record; and of the assignment of errors; and a like copy for the clerk of the Supreme Judicial Court which shall be kept on file in said court; and one copy of the assignment of errors and of the summary of the record for each associate justice, for each party, and for the reporter of decisions, and such further copies or papers as the Supreme Judicial Court may order in any particular case.

23.

Extension of Time for Filing Assignment of Errors.

An order extending the time for filing an assignment of errors under G. L. (Ter. Ed.) c. 278, § 33D, may be made by consent or after notice and hearing at which the defendant need not be present in person; but only if a motion therefor be filed before the expiration of the period for filing.

Petitions for Leave to Appeal and Petitions for Leave to Enter Late.

24.

Notice of Petition; Statements in Opposition; Number of Copies.

Upon the filing of a petition for leave to appeal under the provisions of G. L. (Ter. Ed.) c. 214, § 28, or G. L. (Ter. Ed.) c.

215, § 15, or the filing of a petition for leave to enter late an appeal, bill of exceptions, or report under the provisions of G. L. (Ter. Ed.) c. 211, § 11, as amended, notice thereof shall be given forthwith to parties adversely interested by causing an attested copy of the petition and the order of the court thereon, if any, to be delivered in hand, to each of said parties, or their attorneys of record, and return of service shall be filed forthwith. Any person desiring to be heard in opposition to the granting of the petition shall file with the clerk, within ten days from the receipt of such notice, a brief statement of the reasons relied upon in such opposition and the matter shall thereupon be considered by the court. There shall be filed four additional copies with each petition and with each statement in opposition thereto.

Sittings.

25.

Dates for Sittings.

Sittings of the full court for hearing questions of law pursuant to G. L. (Ter. Ed.) c. 211, § 13, shall be held as follows:

for the county of Berkshire at Pittsfield on the third Tuesday of September;

for the counties of Franklin and Hampshire alternately at Greenfield and Northampton, the sitting at Northampton being in the even year, on the Wednesday after the third Tuesday of September;

for the county of Hampden at Springfield on the Thursday after the third Tuesday of September;

for the county of Worcester at Worcester on the first Monday after the third Tuesday of September;

for the counties of Bristol, Dukes County, and Nantucket at Taunton on the fourth Monday of October.

RULES FOR THE REGULATION OF PRACTICE AT COMMON LAW AND IN EQUITY.

1.

(Applicable to all cases.)

Fixing Time for Pleadings and Proceedings.

The court in its discretion may order or permit pleadings to be filed, or any act to be done, at other times than are provided in these rules.

Whenever in the progress of any case it becomes necessary that a pleading be filed or other step taken so that the case may proceed, and the matter is not covered by any provision of statute or rule, the court may fix the time for the filing of such pleading or make any other appropriate order.

2.

(Applicable to all cases.)

Indorsement of Papers.

The full name of the plaintiff or petitioner and of the defendant or respondent first named in the case, a descriptive title of the particular motion, pleading or other paper, the name of the attorney filing the same, and as to a paper filed subsequent to the answer, the number of the case, shall be indorsed on the paper before filing in the clerk's office. In case of failure to comply with this rule, the court may entertain a motion to strike such paper from the files, and may allow such motion to strike or deny it upon terms against the party at fault.

3.

(Applicable to all cases.)

Appearances.

The name and address of the attorney for every party, or of the party if no attorney appears for him, shall be entered upon the docket as they appear upon the paper or papers constituting the appearance, or some paper transmitted to the clerk therewith. Where no address of the attorney or party, as the case may be, appears upon the docket, notice to such party may be given by posting the same publicly in the clerk's

office or in a room, hall or passage adjacent thereto. The clerk upon request shall post the same.

A substitution of attorneys or an address or change of address shall be entered by the clerk upon the docket at any time after the appearance, on written request filed in the particular case. The court and parties, until such substitution or change is entered, and thereafter until the parties have notice thereof, may rely on action by, and notice to, any attorney previously appearing, and on notice at an address previously entered.

Any appearance shall constitute a general appearance unless the purposes thereof are specified in writing.

4.

(Applicable to all cases.)

Giving of Notice.

A notice to a party required by or given in pursuance of these rules, or any statute relative to procedure not requiring a different notice, shall be in writing, and, except as otherwise permitted by Rule 3, shall be given to such party or his attorney or any of his attorneys by delivering the same personally to him or by mailing the same, postage prepaid, to him at his business address or the address entered under Rule 3.

An affidavit of the person giving the notice shall be evidence thereof.

This rule shall not apply to original process or notice to bring a party before the court.

5.

(Applicable to all cases.)

Time for Pleadings and Proceedings When Last Day for Performance Falls on Sunday or a Legal Holiday.

When the day or the last day for the performance of any act authorized or required by these rules or by any order of the court falls on Sunday or a legal holiday, the act may be performed on the next succeeding business day, unless a contrary intent appears.

6.

(Applicable to all cases.)

Eliminating Requirement for Verification by Oath or Affirmation.

No written statement in any proceeding in this court required to be verified by affidavit shall be required to be verified by oath or affirmation if it contains or is verified by a written declaration that it is made under the penalties of perjury.

7.

(Applicable to equity cases.)

Form of Subpoena.

When, in a suit in equity, the original process to require the appearance of a defendant shall be a subpoena, it shall be in the form following:

Commonwealth of Massachusetts

ss.

To A. B. of

[L. S.] Greeting:

Whereas a suit in equity has been begun against you in our Supreme Judicial Court, within and for the county of , by C. D. of , WE COMMAND YOU, if you intend to make any defense, that on the first Monday of next, which day is the return day of this subpoena, or within such further time as the law allows, you do cause your written appearance to be entered and your written answer or other lawful pleading to be filed in the office of the clerk of said court at in said county first above named, and further that you defend against said suit according to law, if you intend to make any defense, and that you do and receive what the court shall order, adjudge, and decree therein.

Hereof fail not, at your peril, as otherwise said suit may be adjudged, and orders and decrees entered therein, in your absence.

Witness, , Chief Justice of our Supreme Judicial Court, the day of in the year of our Lord one thousand nine hundred and

Clerk.

If, by special order, the court so directs, the time for appearance and pleading may vary from the foregoing, and the form shall be altered to conform to the order.

8.

(Applicable to equity cases.)

Injunctions and Restraining Orders.

No injunction or restraining order shall be ordered until the bill is filed, unless for good cause shown. No injunction or restraining order shall issue except upon verification of the material facts by affidavit or otherwise as prescribed in Rule 6.

9.

(Applicable to equity cases.)

Service of Subpoena.

A subpoena shall be served in the same manner as a writ of original summons without attachment. The court may order further service of the suit to a resident defendant not personally served, in the instances and manner and with the effect provided in G. L. (Ter. Ed.) c. 227, § 7. The court in all cases may require proof of actual notice.

10.

(Applicable to equity cases.)

Absent Parties.

Where it appears that a party, or a person who might otherwise properly be made a party, cannot be served with process by reason of being out of the jurisdiction of the court, the court may, in its discretion, where such party or person is not indispensable, proceed without service upon such party or without making such person a party; but in such case the decree shall affect only such persons and property as are within the jurisdiction of the court.

11.

(Applicable to equity cases.)

Substituted Service on Nonresidents.

Whenever it appears that a defendant resides out of the Commonwealth or in parts unknown and no service of process

has been made upon him within the Commonwealth, the clerk, on application of the plaintiff, at any time after the filing of the bill, shall enter an order requiring such defendant to appear and answer the plaintiff's bill, if in any part of the United States or territory belonging thereto east of the Pacific Ocean, except Alaska, or in Newfoundland, Prince Edward Island, Nova Scotia, New Brunswick, Quebec, or Ontario, within one month from the return day next succeeding the date of such order; in any other part of North America, including the West India Islands, the Bahama Islands and the Bermudas, or in Europe, within two months from such return day; in other parts, or in parts unknown, within four months from such return day. The order shall state the title of the suit, and shall set forth briefly the substance of the plaintiff's bill. A copy of the order shall be served on such defendant personally if practicable. Otherwise the order shall be served by publishing a copy three times in different weeks, in some newspaper, designated by the clerk or the court, published in the county where the case is pending, and by mailing a copy of the order, postpaid, by registered mail if practicable, to the defendant at his last known address. Such service shall be completed not later than the beginning of the periods before the return day prescribed in this rule.

Personal service outside the Commonwealth shall be made by an officer or person qualified to serve civil process in the place where service is made, by a consul, vice-consul, or consular agent of the United States, or by any other person authorized by the court, by delivery of a copy of the notice. The return of service shall be verified by affidavit of the officer or person making such service. If such service is made by an officer or person qualified to serve civil process in the place where service is made, his authority shall be certified by the clerk of a court of record or by a consul, vice-consul, or consular agent of the United States.

Service by publication and mailing shall be proved by affidavit containing a particular statement thereof, accompanied by a copy of each issue of the newspaper containing the publication, and if practicable by the return receipt showing receipt of a copy sent by registered mail.

The court may order further notice in its discretion. The court may require proof of actual notice.

12.

(Applicable to equity cases.)

Answers in Equity.

The defendant, in answering, shall answer fully, directly and specifically to every material allegation or statement in the bill, so far as it relates or refers to him, and in simple terms set out his defense to each claim asserted by the bill, omitting any mere statement of evidence and avoiding any general denial of the averments of the bill or of any part thereof, but specifically admitting, denying or explaining every fact upon which the plaintiff relies, unless he is without knowledge, in which case he shall so state and this shall be treated as a denial. Averments other than of value or amount of damages, if not explicitly denied, may be ordered taken for confessed, except as against an infant, lunatic or other person *non compos* and not under guardianship; but the answer may be amended, by leave of the court, so as to put any averment in issue, when justice requires it. The answer may state as many defenses, in the alternative, regardless of consistency, as the defendant deems essential to his defense.

The defendant, in answering, shall not do so evasively, but shall answer the point of substance. For example, if an allegation is made as to a certain quantity or amount, a denial of the fact as to that quantity or amount shall not be sufficient, but the defendant shall answer as to any other quantity or amount. Likewise, if an allegation is made with divers circumstances, it shall not be sufficient to deny it along with those circumstances.

The court may entertain a motion to strike out the whole or any part of an answer on the ground that it discloses no defense or no counterclaim or violates this rule. The court may entertain a motion to take for confessed the whole or any part of a bill for want of sufficient answer.

13.

(Applicable to equity cases.)

Counterclaim.

The answer, without cross-bill, must set up any counterclaim, against any one or more of the parties, arising out of

the transaction which is the subject matter of the suit, which might be the subject of an independent suit in equity. The answer may set up (a) any counterclaim of a legal nature, against any one or more of the parties, arising out of such transaction, or (b) any counterclaim against the plaintiff alone, not arising out of such transaction, which might be the subject of an independent suit in equity.

Such counterclaim shall have the same effect as a cross-bill so as to enable the court to enter a final decree in the same suit on both the original and cross-claims. No cross-bill shall be filed.

A counterclaim shall be stated in short and simple form and described clearly as by way of counterclaim.

When in the determination of a counterclaim complete relief cannot be granted without the presence of parties other than those to the bill, the court shall order them to be brought in as defendants if they are subject to its jurisdiction.

The court in its discretion may strike out any counterclaim if it appears that the matter cannot conveniently be determined in the suit.

14.

(Applicable to equity cases.)

Appearance, Order Pro Confesso, and Final Decree.

The day of appearance shall be the return day of the writ or subpoena, when personal service shall be made on the defendant, or he shall have had personal notice of the suit; or the return day of any order issued under Rule 9 or 11, when no

personal service shall be made. And, if the defendant does not appear and file his answer, plea, or demurrer within twenty-one days after the day of appearance, an order may be entered to take the bill for confessed. When a decree has been entered taking the bill for confessed, the court may proceed at any time after the expiration of four days from the date of such decree to enter a final decree, unless good cause appears to the contrary.

15.

(Applicable to equity cases.)

Notice on Decree Pro Confesso.

Upon the entry of an interlocutory decree in equity taking the bill *pro confesso,* the clerk shall forthwith give written notice thereof, by mailing the same postage prepaid, addressed to the attorney or attorneys of record of the party or parties against whom such decree is entered, or, in cases where the officer's return does not show that personal service of the bill or order therein has been made, to the said party or parties at their place of residence as shown by the record, or in accordance with a special order of the court. Similar notices shall be given to a plaintiff or his attorneys when a bill is dismissed for want of prosecution.

16.

(Applicable to equity cases.)

Demurrers, Pleas, and Answers in Equity.

The defendant, at any time before the bill is taken for confessed, or afterwards by leave of court, may demur, plead, or answer to the bill; and he may demur to part, plead to part, and answer as to the residue.

The court may give leave *ex parte* to a defendant to file a demurrer or plea, reserving his answer. In the absence of such leave, the defendant must (a) file at the same time his demurrer, plea, and answer, or such of them as he may desire, and shall have no right without leave of court to file another of such pleadings after filing any one of them, or (b) include in his answer any special matter by way of demurrer and plea, or either of them, describing such matter clearly as by way

of demurrer or plea as the case may be, in which case and not otherwise he shall have the same benefit therefrom as if he had pleaded the same or demurred to the bill.

If a plea or demurrer shall be filed, with leave to reserve the answer, and the plea or demurrer shall be overruled or disproved, no other plea or demurrer shall be received without leave of court, but the defendant shall within ten days answer the bill.

If, upon an issue on a plea, the facts pleaded be determined for the defendant, they shall avail him only as far as in law and equity they ought to avail him.

17.

(Applicable to equity cases.)

Costs on Interlocutory Order or Decree.

In making any interlocutory order or decree costs may be ordered in the discretion of the court.

18.

(Applicable to equity cases.)

Hearing on Bill and Answer.

Within five days after the filing of the answer, the plaintiff may set down the case for hearing on bill and answer.

19.

(Applicable to equity cases.)

Exceptions to Answer to Bill for Discovery.

When discovery is sought in the bill, if the plaintiff excepts to an answer as insufficient, he shall file his exception and forthwith give notice thereof to the defendant; and if within ten days the defendant puts in a sufficient answer, the same shall be received without costs; but if the defendant insists on the sufficiency of his answer, he shall, within ten days, file a statement to that effect, and give notice thereof to the plaintiff. Thereupon the exceptions may be considered by the court, or referred to a master; if the latter, either party, dissatisfied with the master's decision, may, within seven days after the filing of his report, set down the exceptions to be argued. If the exceptions are overruled, or the answer adjudged in-

sufficient, the party prevailing on the exceptions shall recover costs to be awarded by the court. If the answer is adjudged insufficient, a new answer shall be filed within ten days. Upon a second answer being adjudged insufficient, costs shall be doubled by the court; and the defendant may be examined upon interrogatories, and committed until he shall answer them.

20.

(Applicable to civil cases.)

Amendments.

A motion for leave to amend shall contain or be accompanied by the proposed amendment.

If a demurrer is sustained, and leave to amend is not denied, a case shall be deemed ripe for final judgment or decree only after ten days from the sustaining of the demurrer, or such other time as the court may allow for amendment, and then only after the disposition of any motion to amend the pleading demurred to, filed within such time. After the expiration of such time no motion to amend such pleading shall be filed without leave of court.

21.

(Applicable to equity cases.)

Amendments by Way of Supplemental Bill.

When the circumstances of the case are such as to require a supplemental bill, or bill in the nature of a supplemental bill, under the earlier equity practice, whether to join additional or different parties or not, the requisite allegations and prayers shall be made by amendment to the original bill, and not according to the earlier equity practice.

22.

(Applicable to equity cases.)

Process to Bring in Representative of Deceased Party.

When the death of any party is suggested in writing, and entered on the docket, the clerk, upon application in writing, may issue process to bring into court the representative of such deceased party, in accordance with G. L. (Ter. Ed.) c.

228, § 12, commanding such representative to appear and defend substantially in conformity, *mutatis mutandis,* with the command of the subpoena prescribed by Rule 7. No bill of revivor or bill in the nature thereof shall be filed.

23.

(Applicable to civil cases.)

Certain Appearances Prohibited.

The attorney for the plaintiff shall not appear or act for a trustee summoned in trustee process, or for a defendant in a bill of interpleader or in the nature of interpleader, or to obtain the instructions of the court or to obtain declaratory relief.

24.

(Applicable to all cases.)

Attorneys as Witnesses.

No attorney shall be permitted to take part in the conduct of a trial in which he has been or intends to be a witness for his client, except by special leave of court.

25.

(Applicable to civil cases.)

Hearings Before Single Justice. Notice.

When any party desires a hearing before a single justice, except at a sitting of the court held in the county where the case is pending, he may apply to a justice to appoint a time and place for the hearing; and when such time and place have been appointed, he shall give notice thereof by mail, postage prepaid, to the adverse party. But this rule shall not prevent a party from obtaining a temporary restraining order, or a dissolution of the same or of an injunction, or other order, upon a shorter notice, or without notice, if the court shall think the same reasonable. And cases may be heard by consent of parties, and the permission of the court, without such notice.

26.

(Applicable to civil cases.)

Report of Evidence.

Upon an appeal, where a report of the testimony has been requested as provided in G. L. (Ter. Ed.) c. 214, § 24, as

amended, or where the court directs such a report, the stenographer or other person designated by the justice shall report the same by filing a certified transcript thereof in the clerk's office, subject to the right of the justice to direct that the report, before copies thereof are prepared for the use of the Supreme Judicial Court, be submitted to him for such correction as he may direct after hearing.

27.

(Applicable to all cases.)

Jury Issues.

Whenever it is necessary or proper to have any fact tried and determined by a jury, the court will direct an issue for that purpose, to be framed by the parties, containing a distinct affirmation and denial of the points in question, or in such form as the court shall order; and the issue thus framed and joined shall be submitted to a jury, and tried upon the like evidence as in an action at law, together with such part of the answers, depositions, and other proceedings in the cause as the court shall direct. When issues are desired in a suit in equity, the application shall be filed within ten days after the answer is filed; but the court may extend or restrict the time.

28.

(Applicable to all cases.)

Copies to Adverse Parties.

When any pleading or motion is filed after the bill, complaint, or petition, or when any bill of particulars or specifications or answers to interrogatories are filed, a copy thereof shall be given not later than the day of filing to the adverse parties in the manner provided for notices by Rule 4.

In case of failure to comply with this rule, the court may entertain a motion to strike such paper from the files, and may allow such motion to strike or deny it upon terms against the party at fault.

29.

(Applicable to civil cases.)

Money Paid Into Court.

Money paid into court shall be in the custody of the clerk, whose duty it shall be to receive it when paid under the authority of law or rule or order of the court. He shall pay it as directed by the court; but money paid into court upon tender, or otherwise for the present and unconditional use of a party, shall be paid, on request, without special order, with any interest which has accrued thereon, to such party, at whose risk it shall be from the time when it is paid into court. Money payable to a party may be paid to his attorney of record.

No interest shall be deemed to accrue on any sum less in amount than the minimum on which interest is payable in the depositary in which the money is deposited.

30.

(Applicable to all cases.)

Hearings Upon Motions Grounded on Facts.

The court need not hear any motion, or opposition thereto, grounded on facts, unless the facts are verified by affidavit, or apparent upon the record and files, or are agreed and stated in writing signed by the attorneys for the parties interested.

31.

(Applicable to all cases.)

Postponement for Want of Evidence.

The court need not entertain any motion for postponement, grounded on the want of material testimony, unless supported by an affidavit, which shall state (1) the name, and, if known, the residence, of the witness whose testimony is wanted, (2) the particular testimony which he is expected to give, with the grounds of such expectation, and (3) the endeavors and means that have been used to procure his attendance or deposition; to the end that the court may judge whether due diligence has been used for that purpose. The party objecting

to the postponement shall not be allowed to contradict the statement of what the absent witness is expected to testify, but may disprove any other fact stated in such affidavit. Such motion will not ordinarily be granted if the adverse party will admit that the absent witness would, if present, testify as stated in the affidavit, and will agree that the same shall be received and considered as evidence at the trial or hearing, as though the witness were present and so testified; and such agreement shall be in writing, upon the affidavit, and signed by such adverse party or his attorney. The same rule shall apply, *mutatis mutandis,* when the motion is grounded on the want of any material document, thing, or other evidence. In all cases the granting or denial of a motion for postponement shall be discretionary, whether the foregoing provisions have been complied with or not.

32.

(Applicable to civil cases.)

Hearings Before Auditors, Masters, Etc.

When any matter is referred to an auditor, master, assessor, commissioner, arbitrator, or referee, if the court does not fix definite times for the hearings, the officer aforesaid, whether requested by the parties or not, shall assign the matter for hearing, give reasonable notice thereof to the parties, and, even though not ordered to proceed from day to day, nevertheless shall proceed as nearly as possible on consecutive days, granting no adjournment for a longer period than seven days except by order of the court. Whenever practicable, hearings shall be held at a court house. The report shall be filed within thirty days after the hearing has been closed, and notice of the filing shall be given to the parties by the clerk forthwith.

If one of the parties fails to appear at a hearing without showing good cause for not appearing, such officer may proceed *ex parte,* and shall do so on motion of the party appearing. If both parties fail to appear without showing good cause, such officer shall make report forthwith to the court, and the clerk shall bring such report forthwith to the attention of a justice.

33.

(Applicable to civil cases at law.)

Auditors Whose Findings of Fact Are Not Final.

When an auditor, whose findings of fact are not final, has prepared a draft copy of his report, he shall furnish the parties with copies thereof and notify them of a time and place when and where they may attend and suggest such alterations as they may think proper; upon consideration whereof, the auditor will finally settle the draft of his report, and give notice thereof to the parties, furnishing them with copies of the report, in so far as it differs from the draft report.

34.

(Applicable to civil cases at law.)

Auditors Whose Findings of Fact Are Final.

The provisions of the first and second paragraphs of Rule 35 shall apply to the report of an auditor whose findings of fact are to be final. Upon a motion for recommittal, no question of law, which was or could have been raised before the auditor, shall be open as of right unless raised by objection appended to the report.

35.

(Applicable to equity cases.)

Masters.

When the master has prepared a draft copy of his report, he shall furnish the parties with copies thereof and notify them of a time and place when and where they may attend and suggest such alterations as they may think proper; upon consideration whereof, the master shall finally settle the draft of his report, and give notice thereof to the parties, furnishing them with copies of the report in so far as it differs from the draft report; whereupon ten days shall be allowed for bringing in written objections thereto, briefly and clearly specifying the matters objected to and the cause thereof, which objections shall be appended to the report.

Unless the court expressly orders otherwise, whenever any objection presented to the master raises a question of law

which depends upon evidence not reported, the master, upon written request presented with the objection, shall append to his report, for the sole purpose of enabling the court to determine such question of law, a brief, accurate, and fair summary of so much of the evidence as shall be necessary for such purpose. But where the objection raises the question whether the evidence was sufficient in law to support a finding of fact made by the master, no such summary shall be made without special order of the court, unless (1) the evidence shall have been taken by a stenographer selected or approved by the master before any evidence was introduced, and (2) the objecting party shall at his expense furnish the master, within the time allowed for bringing in objections, with a transcript of so much of the evidence taken by such stenographer as is material to such question of law. The master shall furnish the parties with copies of his proposed summary at least five days before filing his report.

Upon the filing of the report in court a party whose objections are appended thereto shall be deemed to have excepted to the report for the reasons set forth in the objections, and no additional exceptions may be filed without a special order of the court.

36.

(Applicable to all cases.)

Writ of Protection.

A writ of protection shall issue only upon the application of the person for whom the writ of protection is to be issued, or some person in his behalf, and upon order of the court, and then only in case it is made to appear to the court, by affidavit and any other evidence that the court may require, (1) that the application is made in good faith and for the purpose of enabling such person to attend this court as a party or witness in some specified case pending, (2) if such person is a party, that such case has not been brought collusively to enable him to obtain a writ of protection, and (3) if such person is a witness, that he has not been required to attend as a witness by his own request or procurement, to enable him to obtain a writ of protection.

37.

(Applicable to civil cases.)

Depositions. Commissions.

The court will grant commissions to take the depositions of witnesses without the Commonwealth. A party may, on application to the clerk, obtain a commission, directed to any commissioner appointed by the Governor of the Commonwealth to take depositions in any other of the United States, or to any justice of the peace, notary public or other officer legally empowered to take depositions or affidavits in the state or country where the deposition is to be taken, or to such other person as the court may order. Unless otherwise ordered, such depositions shall be taken upon interrogatories filed by the party applying for the commission, and upon cross-interrogatories, if any, filed by each adverse party, which interrogatories and cross-interrogatories shall be annexed to the commission. The party applying for the commission shall file his interrogatories in the clerk's office, give notice thereof to each adverse party, with a copy of the interrogatories, and file an affidavit of such notice in the clerk's office. The cross-interrogatories, if any, shall be filed within seven days after the giving of such notice, or within such further time as the court may order, and copies shall be given to all adverse parties. But where an adverse party does not appear, no notice need be given him. When a deposition is taken and certified by any person as an officer or person to whom the commission was directed, if it shall be objected that such person was not one to whom the commission was directed, the burden of proof shall be on the party so objecting. But if an objection be made to the authority of a person taking a deposition without such commission, the burden of proof of such authority shall be on the party producing the deposition.

38.

(Applicable to civil cases.)

Depositions. Manner of Taking.

Where a deposition is taken on interrogatories, no party nor any attorney or agent shall be permitted to attend at the

taking thereof, or to communicate by interrogatories or suggestions with the deponent while giving his deposition. The commissioner shall take such deposition in a place separate and apart from all other persons, and shall permit no person to be present during such examination except the deponent himself, and such disinterested person, if any, as he may think fit to appoint as a clerk or stenographer to assist him in reducing the deposition to writing. The commissioner shall put the several interrogatories and cross-interrogatories to the deponent in their order, and shall take the answer of the deponent to each, fully and clearly, before proceeding to the next; and shall not read to the deponent, nor permit the deponent to read, a succeeding interrogatory, until the answer to the preceding has been fully taken down. The clerk, on issuing a commission to take a deposition on interrogatories, shall insert the substance of this rule therein; or shall annex this rule, or the substance thereof, to the commission, by way of notice and instruction to the commissioner.

39.

(Applicable to civil cases.)

Depositions Within the Commonwealth.

Depositions may be taken within the Commonwealth, for the causes and in the manner by law prescribed, even during a session of the court; provided they be taken in the town or city in which the court is held; and provided, further, that if, at the hour named for taking the deposition, all of the attorneys of record of each adverse party are actually engaged in court, the taking shall be postponed until the usual hour of adjournment of court. By consent of parties or special order of court, depositions within the Commonwealth may be taken at any time or place.

40.

(Applicable to civil cases.)

Depositions. Filing and Use.

Depositions shall be opened and filed by the clerk when received. If a deposition is not offered in evidence by the party taking it, it may be offered by any other party, on such terms, if any, as the court may order.

41.

(Applicable to all cases.)

Objections to Evidence.

Objections to evidence shall be decided without argument, unless the presiding judge calls upon the parties to state the grounds upon which the evidence is offered or objected to.

42.

(Applicable to all cases.)

Requests for Rulings.

Requests for rulings shall be made in writing before the closing arguments unless special leave is given to present further requests later.

43.

(Applicable to all cases.)

Taking of Exceptions.

No exception shall be allowed to any opinion, ruling, direction or judgment made in the presence of counsel, unless it be taken at the time such opinion, ruling, direction or judgment is given. Exceptions to any opinion, ruling, direction or judgment made in the absence of counsel shall be taken by a writing filed with the clerk within three days after the receipt from the clerk of notice thereof.

44.

(Applicable to equity cases.)

Form of Decrees.

The attorney of the party in whose favor a decree or order is made shall draw the same; and without reciting previous proceedings, decrees shall, in appropriate cases, begin, in substance, as follows:—

"This cause came on to be heard, [or to be further heard, as the fact may be] and was argued by counsel; and thereupon, upon consideration thereof, it is ordered, adjudged and decreed," etc.

But if it is intended that the final decree shall serve as a record of the case, proper recitals of previous proceedings may be inserted therein.

45.

(Applicable to equity cases.)

Enforcement of Final Decrees.

If a final decree provides for the unconditional payment of money, by way of costs or otherwise, the clerk, upon request of a party entitled thereto, shall issue a writ of execution in common form thereon, unless the court shall otherwise order, and proceedings for contempt for non payment shall not be begun upon such decree without leave of court.

46.

(Applicable to proceedings to review orders, etc. of the department of public utilities.)

Reviews of Orders of Department of Public Utilities.

So far as the rules of practice in equity are applicable, they shall govern proceedings brought under the provisions of G. L. (Ter. Ed.) c. 25, § 5, or G. L. (Ter. Ed.) c. 110A, § 13, or acts in amendment thereof.

Unless the interests of justice plainly require, no stay of an order of the department of public utilities shall be ordered except after notice to the Attorney General or the commissioners of the department.

An order of the department fixing the rates, fares, charges, or prices for service furnished by a person or corporation under its jurisdiction shall not be stayed unless provision be made by the party applying for such stay by bond or other security for the repayment, in the event the order is finally sustained, of so much of rates, fares, charges, or prices collected, while such stay is in effect, as is in excess of those fixed in the order.

47.

(Applicable to equity cases.)

Discharge of Receiver.

No decree shall be entered discharging a receiver unless it appears that he has filed in the clerk's office an account showing an itemized statement in detail of all his receipts and disbursements and that such account has been allowed.

48.

(Applicable to all cases.)

Time for Arguments.

All arguments shall be limited to one-half hour on each side, unless for good cause shown, the court shall allow further time; and, when more than one counsel are to be heard on the same side, the time may be divided between them as they may elect.

49.

(Applicable to cases at law.)

Writ of Error. Assignment of Errors. Time for Defendant to Plead.

Before taking out a writ of error, the plaintiff shall file the assignment of errors in the clerk's office, and a copy shall be inserted in the *scire facias;* and the defendant shall be held to plead thereto within ten days after the return day of the *scire facias,* unless the court shall by special order restrict or enlarge the time.

50.

(Applicable to cases at law.)

Writ of Error. Hearing.

Writs of error may be presented to a single justice, who may after notice hear and determine the same both as to questions of law and of fact, subject to exceptions as provided by law, or reserve and report the case.

51.

(Applicable to appeals from the Appellate Tax Board.)

Appeals from Decisions of Appellate Tax Board.

Interlocutory matters arising in appeals from the decisions of the Appellate Tax Board, and questions of final disposition thereof when further proceedings appear unnecessary, may be presented to a single justice, who may after notice hear and determine the same both as to questions of law and of fact, subject to exceptions as provided by law, or reserve and report the case.

52.

(Applicable to certiorari proceedings.)

Certiorari.

A petitioner in a petition for a writ of certiorari who desires to contend at the hearing, as permitted by G. L. (Ter. Ed.) c. 249, § 4, as amended, that the evidence which formed the basis of the action complained of or the basis of any specified finding or conclusion was as matter of law insufficient to warrant such action, finding, or conclusion may cause the evidence adduced before the respondent bearing upon such action, finding, or conclusion to be exhibited to this court by motion that such evidence be included in the respondent's return or in an extended return.

53.

(Applicable to cases in Suffolk County.)

Order of Business.

The justice designated to hear matters within the jurisdiction of a single justice at Boston will come in on Wednesday except in the weeks in which the full court is sitting for consultation. If Wednesday is a legal holiday, the justice may come in on Thursday. During the months of July, August, and September no case will be heard on the merits unless for special cause shown. A weekly list will be made up on which cases from any county may be set down, either by order of the court; or by agreement of counsel and notice to the clerk; or by written notice to all parties interested seven days at least before the day of hearing and by filing with the clerk not later than the day preceding the hearing an affidavit of such notice.

GENERAL RULES.

1.

Attorneys.

(1) Any citizen of the United States and any alien who has made the primary declaration to become a citizen of the United States under Federal laws and who has not claimed exemption from military service on the ground of being an alien, if twenty-one years of age or over, may apply for admission as an attorney. Every application, including applications by persons who have been disbarred, shall be made by a petition either to the Supreme Judicial Court or to the Superior Court, accompanied by the recommendation of a member of the bar of this Commonwealth. Such petition shall be filed in the county where the applicant resides or in the county of Suffolk, but in the case of a person disbarred the petition shall be filed in the county and court in which the judgment of disbarment was entered.

(2) Every such petition shall be referred to the board of bar examiners to find and report with reference to the character, acquirements and qualifications of the applicant. The board may, subject to the approval of the full court, make rules not inconsistent with these rules concerning the time of filing applications, credentials required, time, place and character of examinations, and other matters of detail and procedure. Any member of the board may summon witnesses to appear before it. Every applicant, except such as may be excused therefrom as authorized by Rule 1(9), shall be required to take a written law examination, which may be supplemented by such oral examination as the board deems proper. No person who does not satisfy the board that he intends without undue delay to enter upon the practice of law or to teach law as a career and to devote substantially his full time to such practice or teaching shall be examined or be recommended for admission. An alien who has filed an application as authorized by Rule 1(1) may be examined but shall not be recommended for admission or be admitted until he has become a citizen.

(3) To be eligible for examination for admission as an attorney, except in the cases of persons who have been dis-

barred in this Commonwealth and except for applicants under Rule 1(9), an applicant shall have received the following education:

(a) *General Education*

Every such applicant shall have graduated from a public day high school in the Commonwealth having a four years' course or otherwise have received an education equivalent thereto in the opinion of the board, and shall have completed one-half of the work accepted for a bachelor's degree in a college approved by the board or otherwise have received an education equivalent thereto in its opinion; provided, however, that this requirement of college study shall not apply to applicants who began the study of law in a law school of the character specified in this rule prior to September 1, 1938, and who successfully completed the work of such a school for not less than one year. Such education shall have been completed before the applicant began the study of law; provided, however, that in the case of any applicant who was a student in a law school prior to January 1, 1949, the board may, if it deems that justice requires, recognize pre-legal education begun in part after the applicant had begun the study of law.

(b) *Legal Education*

Every such applicant shall have completed a course in a law school having a three-year course and requiring students to devote substantially all of their working time to their studies, called a full-time law school, or in a law school having a course of not less than four school years equivalent in the number of working hours to a three-year course in a full-time law school and in which students devote only part of their working time to their studies, called a part-time law school. The board may accept courses completed in less than the periods specified as a result of attendance at summer sessions or otherwise if it deems such accelerated courses to be the equivalent of a regular three-year course in a full-time law school or a regular four-year course in a part-time law school. Every applicant shall not only have completed a course in one of the above described law schools but shall either have graduated therefrom or have passed examinations in at least all but two required subjects. An applicant may spend part of

the required time in a full-time law school and part in a part-time law school, provided he satisfies the board that in the two schools together he has devoted the working time which would be required in either in order to graduate and also has passed examinations in at least all but two required subjects in the two schools together. The board may where necessary to prevent hardship permit the taking of an examination by an applicant, otherwise eligible, who has not fully completed the last year of a law-school course within the meaning of this paragraph but shall not recommend such applicant for admission until he shall have completed such course, provided, however, that an applicant who has been permitted to take and has passed an examination under this provision and who is in the Army, Navy, Marine Corps or Coast Guard of the United States or who has received an honorable discharge therefrom may be recommended for admission without completing such courses if in the opinion of the board his educational and examination records warrant such action. Study in any law school which conducts its courses by correspondence or does not require the attendance of its students at its lectures or courses shall not constitute a compliance with this rule.

In lieu of having had the foregoing legal education an applicant shall be eligible for examination who in the opinion of the board has devoted three full years or their equivalent, usual vacations excepted, to the study of law in the office of and under the supervision of a member of the bar of this Commonwealth approved by the board and pursuant to a course of study approved by it, such approvals to be given before the study begins. An applicant who has begun his study of law in an office as herein specified may complete his study in a law school as herein specified, and an applicant who has begun his study of law in a law school as herein specified may, with the approval of the board in advance, complete his study in an office as herein specified.

This rule shall not apply to applicants who have heretofore been examined under eligibility rules previously in force, to whom the rules in effect at their first examination shall apply.

(4) After a law examination has been held and before the board reports to the court with reference to the results thereof the board shall publish a list of the names of the ap-

plicants found to possess the required qualifications for three successive days in such newspaper or newspapers as the board may determine, the first publication to be at least fifteen days before the board reports to the court. A copy of such list shall be sent to the clerks of the several courts wherein petitions for admission are pending and also to the secretaries of the Massachusetts Bar Association, the Bar Association of the City of Boston, and such other bar associations as the board may determine.

(5) If the board reports that an applicant, other than an applicant who has been disbarred in this Commonwealth, is of good moral character and of sufficient acquirements and qualifications he may be sworn and enrolled unless a hearing before the court shall have been ordered. If the board reports recommending that such applicant be not admitted a judgment dismissing the application shall be entered as of course at the expiration of sixty days thereafter, unless a hearing before the court shall have been ordered. Every application for such a hearing shall be presented to the chief justice of the court in which the application is pending who shall designate a justice to hear the matter.

(6) Except where the court or a justice thereof institutes disciplinary proceedings, every petition or other means of instituting proceedings for the discipline of an attorney shall be filed with the clerk in any county in which the attorney resides or maintains an office, and shall be presented to the chief justice of the court in which it is filed, who shall designate a justice to hear the matter.

Discipline of attorneys may be by disbarment, by suspension or by censure.

(7) The foregoing rules in relation to admission shall apply in all respects to applications by persons who have been disbarred in this Commonwealth, except that in no event may such an application be filed until at least five years have elapsed since the judgment of disbarment and that it must be filed in the court which entered that judgment and in the county in which it was entered. In such cases the applicant shall not be subject to the provisions of Rule 1(3) relating to preliminary, general and legal education. The board shall

first determine whether such an applicant possesses sufficient intellectual acquirements and qualifications to warrant his admission to the bar.

If the finding of the board upon that issue is in the negative it shall so report to the court and take no further action unless otherwise directed by the court. Upon the filing of such a report a judgment dismissing the application shall be entered as of course at the expiration of sixty days thereafter unless a hearing before the court shall have been ordered. Every application for such a hearing shall be presented to the chief justice of the court in which it is filed, who shall designate a justice to hear the matter.

If the finding of the board upon that issue is in the affirmative it shall then inquire fully into the moral character of the applicant, hear such relevant evidence as shall be presented to it, and report its findings and recommendations to the court as to the moral character, acquirements, and qualifications of the applicant. It shall report whether or not the evidence before it affirmatively establishes that the applicant is at the date of the report of good moral character and shall state the history of the disbarment proceedings, the grounds for the judgment, and all other pertinent facts. Upon the filing of such a report the board shall transmit a copy to the Chief Justice of the Supreme Judicial Court. All such reports, whether or not favorable to the applicant, shall be presented to the chief justice of the court in which the proceedings are pending, who shall designate a justice to hear the matter. At such hearing the report shall have the weight and effect of an auditor's report in an action at law.

(8) No judgment admitting as an attorney an applicant to whom the foregoing rule applies shall be entered until the expiration of thirty days or such further time as the court shall direct after the filing of the order for such judgment. At any time after such an order for judgment and before judgment is entered the full court of the Supreme Judicial Court on its own motion or on the petition of the Attorney General, of any district attorney, or of any bar association may order the entire record of the proceedings to be certified to it for a review of all matters of law or fact. Upon such order the justice shall report all evidence heard by him in stenographic

form if available, otherwise in summary form. Thereupon the record shall be printed by the clerk and entered in the full court and no judgment shall be entered except such as the full court shall direct. Nothing in this or the preceding rule shall deprive the petitioner of any rights that he may have to obtain a decision of the full court by exception, report, appeal or otherwise.

(9) A citizen of the United States who has been admitted as an attorney of the highest judicial court of any state, district or territory of the United States or of any foreign country of which he was an inhabitant may be admitted as an attorney in this Commonwealth upon establishing his good moral character and his intellectual qualifications and legal attainments. No person who does not satisfy the board that he has entered or intends without undue delay to enter upon the practice or teaching of law as a career and to devote substantially his full time to such practice or teaching shall be recommended for admission. All applications under this rule shall be referred to the board unless the court orders otherwise. The board may excuse such an applicant from taking a regular law examination if he has been a member of the bar of the highest court of one or more such jurisdictions, or, in the case of the District of Columbia, of the District Court of the United States for the District of Columbia, for not less than five years and if he has since his admission been engaged in the actual practice or teaching of law for not less than five years, provided that his education and experience in practice or teaching in the opinion of the board warrant such action. In the case of applicants under this provision who are in the Army, Navy, Marine Corps, or Coast Guard of the United States or who have received an honorable discharge therefrom, the board may in its discretion shorten the required five-year period of actual practice or teaching. In the case of applicants recommended for admission without examination, the board, before it makes a favorable report to the court, shall publish a notice for three successive days in such newspaper or newspapers as the board may determine, the first publication to be at least fifteen days before the board makes its report.

2.

Administration of Justice.

(1) No justice, special justice, clerk or assistant clerk of a District Court shall be retained or employed or shall practise as an attorney on the criminal side of any court in the Commonwealth.

(2) No special justice of a District Court shall be retained or employed or shall practise as an attorney on the civil side of his court. This rule shall not be applicable to a special justice of any District Court where the population of the district, according to the last preceding state or national census, shall be less than twelve thousand.

3.

Form of Separate Summons to Be Used with Writs of Summons and Attachment.

G. L. (Ter. Ed.) c. 223, § 16.

The form of separate summons to be used with writs of summons and attachment shall be in the following form.

Separate summons, to be used with writ of summons and attachment, as required by G. L. (Ter. Ed.) c. 223, §§ 17, 18, 29, 30.

COMMONWEALTH OF MASSACHUSETTS

SS Court.

(Seal of Court)

To C.D. of within our County of

Whereas A.B. of within our County of has begun an action of against you by writ dated 19 and returnable in the Court holden at within our County of on the day of 19 in which action damages are claimed in the sum of dollars as follows:

(nature of claim) (note 1)

as will more fully appear from the declaration to be filed in said Court when and if said action is entered therein:

WE COMMAND YOU, if you intend to make any defense to said action, that on said day of or within

such further time as the law allows, you cause your written appearance to be entered and your written answer or other lawful pleadings to be filed in the office of the Clerk of the Court to which said writ is returnable, and that you defend against said action according to law.

Hereof fail not at your peril, as otherwise judgment may be entered against you in said action without further notice.

Your goods or estate have been attached as security to satisfy any judgment which may be recovered against you in said action. (note 2)

Witness Esquire at the day of in the year of our Lord one thousand nine hundred .

Clerk.

Note 1. The nature of the claim should not be limited to the words "contract" or "tort" but should be specified as "for goods sold" or "assault", or "for rent", or some other simple words.

Note 2. If no actual attachment is directed to be made, the statement that goods and property have been attached should be crossed out.

4.

Form of Trustee Writ.

G. L. (Ter. Ed.) c. 223, §16; c. 246, §28, as appearing in St. 1941, c. 338, §1, as amended by St. 1947, c. 264, §1.

The last paragraph of the trustee writ (preceding the attestation clause) as heretofore established and in common use shall be as follows:

Said trustee and the defendant are notified that under the law, if wages for personal labor or personal services or a pension not otherwise exempt by law from attachment is hereby attached, an amount of such wages not exceeding twenty-five dollars for each week during which such wages were earned and an amount of such pension not exceeding twenty-five dollars for each week which has elapsed since the last preceding payment under such pension was payable is exempt from such attachment, and said trustee is/are hereby directed to pay over such exempted amounts in the same

manner and at the same time such amounts would have been paid if no attachment had been made.

5.

Form of Certain Original Executions for All Courts of the Commonwealth.

G. L. (Ter. Ed.) c. 235, §§ 22, 23.

Original executions to be issued in all courts of the Commonwealth on judgments against executors, administrators, and other fiduciary officers in their representative capacity, including any such original execution running against two or more parties, any one or more of whom are fiduciary officers as aforesaid in their representative capacity, or against sheriffs under G. L. (Ter. Ed.) c. 37, § 10, or special judgments entered under G. L. (Ter. Ed.) c. 235, § 24, shall in the last sentence after the words "in sixty days from the date hereof" contain the clause "or within ten days after this writ has been satisfied or discharged."

All other original executions to be issued on judgments in all courts of the Commonwealth shall contain a last sentence reading as follows:

"Hereof fail not, and make return of this writ with your doings thereon into the clerk's office of our said Court, at within our county of , within twenty years after the date of the said judgment, or within ten days after this writ has been satisfied or discharged."

No execution shall be invalid which conforms in substance to the provisions of this rule.

6.

Form of Alias Executions for All Courts of the Commonwealth.

G. L. (Ter. Ed.) c. 235, § 22.

Alias and successive executions to be used in all courts of the Commonwealth shall contain the following: Immediately after the words, "We command you, therefore," there shall be inserted "as we have before commanded you."

The last sentence shall be:

"Hereof fail not, and make return of this writ with your doings thereon into the clerk's office of our said Court at within our county of within five years from the date hereof, or within ten days after this writ is satisfied in whole or discharged by law."

No execution shall be invalid which conforms in substance to the provisions of this rule.

7.

Records of the Supreme Judicial Court and of the Superior Courts.

G. L. (Ter. Ed.) c. 221, § 27, as appearing in St. 1939, c. 157, § 2.

(1) The records of the Supreme Judicial Court and of the Superior Court in the several counties shall consist of the docket, the files, record of judgments, any extended records, and whatever other specific records may be required by special statute, and no others.

(2) There shall be two dockets in the Supreme Judicial Court: a full-court docket and a law, equity, and probate docket; except that in any county separate dockets for law and for equity may be kept by special order of the court. The full-court docket shall be kept by the clerks only in those counties from which cases do not go to the Supreme Judicial Court for the Commonwealth under G. L. (Ter. Ed.) c. 221, § 27, as appearing in St. 1939, c. 157, § 2, and shall contain entries of such actions only as have been appealed or transferred to the Supreme Judicial Court for hearing upon questions of law. The law and equity docket shall be kept by the clerk in each county.

(3) There shall be five dockets in the Superior Court: a common-law and equity docket, a divorce docket, a criminal docket, a juvenile docket, and a docket of defective delinquents; except that in the counties of Suffolk, Middlesex, and Essex, there shall be a separate equity docket in which all equity cases shall be entered.

(4) The dockets are records wherein the clerk shall register, by its title, every action, suit, or proceeding, civil and criminal, commenced in, or transferred or appealed to, the court whereof he is clerk, according to the date of its actual

entry. He shall note therein, according to the date thereof, the filing or return of any paper or process, the making of any order, rule, or other direction in or concerning such action, suit, or proceeding, civil and criminal, the verdict or finding, the allowance of exceptions, and the entry of final judgment, final decree or order.

(5) The divorce docket shall contain the full names and the city or town of residence of the parties, except as provided by G. L. (Ter. Ed.) c. 208, § 10, as appearing in St. 1943, c. 196, § 1, respecting co-respondents, and, all in a brief and summary way, shall state in substance the cause or causes alleged for divorce, the date and place of their occurrence, the fact of attachment of property, if any, the kind of service of the libel, the names and ages of any child or children set forth in the libel, the interlocutory and final orders and decrees.

(6) The criminal docket shall be kept in the form heretofore in common usage, being substantially as provided in section (4) hereof.

(7) The files are all papers and processes filed with or by the clerk of the court in any action, suit, or proceeding therein, or before the justice thereof, including executions, with their returns. So far as reasonably practicable, they shall be of usual quarto size, of standard quality of paper with adequate margins, and, except writs and other processes with the return of service thereon, shall be printed or typewritten, upon one side only; except that appearances and claims for jury may be also upon paper approximately three and three-eighths inches by eight and one-half inches. Sheets eight inches by ten inches and nine and one-half inches by thirteen inches, and of intervening sizes, may be deemed of quarto size for the purposes of this rule. It is desirable that the blanks in writs be filled in in typewriting, and that all papers shall bear on the back the full name of the plaintiff and of the defendant first named in the action, the nature of the paper, and the name of the attorney filing the same. All such papers and processes shall be numbered consecutively in each case as entered.

(8) Resort may be had to the docket, files, record of judgments, and any extended record for evidence as to the history and disposition of any case, but the full extended record, where one has been made, shall control.

(9) The docket shall be kept by the loose-leaf system, and the record shall be kept in typewriting, or partly in typewriting and partly in print, except as otherwise ordered by the court. Typewriter ribbons of permanent character shall be used. Those authorized for use on public records shall be regarded as sufficient under this rule, unless otherwise ordered by the court. The leaves of both docket and record when completed shall be strongly bound in volumes of appropriate size.

(10) Immediately after the final disposition of each action, suit or proceeding, complaint or indictment, papers constituting the files shall be assembled, collated, and arranged in order as theretofore numbered, and thereafter shall be kept in such order, except that executions may for greater safety be kept in a more secure place.

(11) The dockets, files, records of judgment and any extended records of the court are to be kept in the clerk's office or in the custody of the clerk, and he is to be strictly responsible for them. They shall not be taken from his custody except in cases authorized by statute, by rule of court, or for use by a justice of the court; but the parties may at all times have copies.

8.

Rule Relative to the Disposal of Stenographic Notes of Testimony Taken in the Courts of the Commonwealth.

G. L. (Ter. Ed.) c. 221, § 27A, as inserted by St. 1939, c. 157, § 3, as amended.

Stenographic notes of testimony made in any court of the Commonwealth in accordance with any provisions of law may be destroyed by the lawful custodian thereof after the expiration of six years from the date when such notes were taken; provided, however, that this rule shall not apply to notes of which a transcript shall have been ordered and not completed or to notes as to which the court in which they were taken shall otherwise order.

9.

Rule Relative to the Disposal of Obsolete and Useless Papers and Records in Courts.

G. L. (Ter. Ed.) c. 221, § 27A, as inserted by St. 1939, c. 157, § 3, as amended.

The clerks of the courts in the several counties, the clerks for the Superior Court for civil and for criminal business in Suffolk County, and the clerks of any of the courts of the Commonwealth except the clerk of the Supreme Judicial Court for the Commonwealth and except the recorder of the Land Court and the registers of probate and insolvency may, from time to time, subject to the proviso hereinafter contained, cause to be destroyed or to be delivered for safe keeping outside of their own custody into the possession of any public or incorporated library or incorporated historical society respectively selected by them with the approval of the judges of their courts as suitable any or all of the following papers filed or deposited in or in relation to proceedings in their respective courts which shall have been finally disposed of for more than twenty years, to wit:

(1) All papers filed in or relating to prosecutions for misdemeanors except in cases of the commitment of defective delinquents; all papers filed in or relating to criminal proceeding where an extended record has been made except capital cases and cases in which a state prison sentence has been imposed; and all papers filed in or relating to proceedings against delinquent or wayward children, proceedings against school offenders under G. L. (Ter. Ed.) c. 77, or corresponding provisions of earlier laws, and proceedings relating to search warrants and forfeitures.

(2) All papers filed in or relating to proceedings under small claims procedure.

(3) All papers filed in or relating to proceedings under G. L. (Ter. Ed.) c. 224, or corresponding provisions of earlier laws, including the former poor debtor proceedings and the former so called equitable process after judgment.

(4) All papers filed in or relating to civil proceedings which shall have been disposed of by dismissal under any

rule or order designed to dispose of old or inactive cases and in which no final judgment or decree shall have been entered on the merits as to any party.

(5) The following papers in any other proceedings except capital cases: Appearances; demurrers and pleas that have been finally overruled; answers in the nature of general denials; replications that set up no new matter; claims for jury trial; interrogatories and answers thereto; demands for admission of facts and answers thereto; depositions; requests for rulings; motions for new trial and affidavits filed in connection therewith and orders thereon; other motions and affidavits in connection therewith and orders and interlocutory decrees thereon; auditors' reports where findings of fact were not final and where judgment was not entered upon the report itself; exceptions and bills of exceptions; draft and final reports to an Appellate Court; witness certificates and other papers relative to costs; transcripts of evidence; letters to clerks or to the court; briefs on the law or facts; and papers used only as bindings or backers for other papers.

The descriptions of papers in (1) to (5) above, inclusive, shall be construed to include papers of the kinds described relating to matters heard before a trial justice or other magistrate and kept in any court.

Said clerks may also from time to time, subject to the proviso hereinafter contained, cause to be destroyed or to be delivered for safe keeping as aforesaid the following papers not filed in or relating to particular proceedings which shall have been deposited in their courts for the respective periods hereinafter stated, to wit: Copies of records of autopsies by medical examiners, reports of inquests, and records of notaries public, twenty years; writs of venire facias, records of votes for county commissioners, and office account books, ten years; papers relating to so called "charges" for alleged violation of motor vehicle parking rules or regulations disposed of in accordance with G. L. (Ter. Ed.) c. 90, § 20A, as inserted by St. 1934, c. 368, §1, as amended, corresponding provisions of earlier laws, where no criminal complaint has been filed, one full calendar year and thereafter until the examiners from the division of accounts have completed their audit of these papers.

Clerks of the court in the several counties may, from time to time, subject to the proviso hereinafter contained, cause to be destroyed or to be delivered for safe keeping as aforesaid all papers or records of county commissioners which have been in their custody respectively for twenty years in the capacity of clerks of the county commissioners except the following:

(1) Records and papers relating to proceedings which shall not have been finally disposed of for more than twenty years.

(2) Records of proceedings at meetings of the commissioners.

(3) County maps.

(4) Records relating to surveyors' compasses.

(5) Records and papers relating to the taking of or the title to real estate.

(6) Records and papers (other than contracts, bills, vouchers, pay rolls and similar routine business papers) relating to action taken by the commissioners in respect to ways, bridges, railroads, dams, common landing places, shore reservations, and cemeteries, with descriptions, maps and plans pertaining to any such excepted subjects.

(7) Records and papers relating to retirement systems and retirement allowances, except such as relate wholly to persons who shall have been deceased for five years or more.

(8) Books of registry or record and reports of agents, officers and committees required to be preserved by G. L. (Ter. Ed.) c. 66, § 8, as amended by St. 1943, c. 128, and by St. 1949, c. 395, § 2.

Provided, however, (1) that no original paper bearing date or known to have been filed earlier than the year eighteen hundred shall be destroyed; (2) that no extended record and no docket or docket entries or index thereto shall be destroyed or disposed of; (3) that no papers shall be destroyed or disposed of in any proceeding in which title to real property or to any interest therein was in issue, but the mere making of an attachment of real property on mesne process or the levy of an execution thereon shall not be deemed to have placed

title in issue; (4) that in any case in which there has been a levy upon execution of real property no writ bearing a return of an attachment of the real property levied upon and no execution bearing a return of the levy thereon shall be destroyed or disposed of; (5) that at least thirty days before any papers are destroyed or disposed of notice that it is proposed to destroy or to dispose of papers under this rule shall have been given to the public by publication in a newspaper published in the county in which the office of the clerk is located and by posting a copy of such notice in his office, or in the office of the county commissioners when papers of county commissioners are to be destroyed or disposed of; (6) that the clerk shall enter upon the records of the court a copy of the notice and a brief statement of the facts as to the destruction or disposition of the papers; (7) that any action taken under this rule shall be subject to the supervision of the court in which the papers are preserved, except that any action relative to papers of county commissioners shall be subject to the joint supervision of a judge of the Superior Court and of the chairman of the county commissioners for the county, and no papers shall be disposed of or destroyed without an order of the court in which the papers are preserved, and in the case of a District Court, without an order of the standing justice of said District Court, and in the case of papers of county commissioners, without an order of a judge of the Superior Court and an order of the chairman of the county commissioners of the county; (8) that exceptions from any general description of papers to be destroyed may be made by the clerk or the judge at any time, and in the case of papers of county commissioners may also be made at any time by the chairman of the county commissioners of the county.

Nothing contained in this rule shall be construed to prevent the destruction or disposal of any papers which could have been lawfully destroyed or disposed of in accordance with the provisions of G. L. (Ter. Ed.) c. 66, § 8, as amended, or otherwise, before the adoption of this rule.

The contents of any paper destroyed in accordance with this rule may be proved by copies of extended records, if such records have been made, and by copies of docket entries, in

so far as such extended records or docket entries indicate such contents, and by any other evidence legally competent to prove the contents of a lost document.

VOTE OF THE EXECUTIVE COMMITTEE AS TO THE POLITICAL ACTIVITIES OF JUDGES.

The substance of the following vote has received attention in the newspapers. The exact terms of the vote are printed here for the information of the members of the association.

At a recent meeting of the Executive Committee the following resolution was adopted:

RESOLVE: For the purpose of maintaining the dignity of, and public confidence in, the courts of the Commonwealth and freeing them from affording a basis of adverse criticism, the Massachusetts Bar Association urges that no justice of any court of the Commonwealth engage in partisan political campaigns, either by way of running for office, serving on political or campaign committees, acting as a delegate, or otherwise taking part in political conventions or engaging in like activities in such campaigns.

THE STANDARD OF EDMUND BURKE

In his address to the electors of Bristol, on his election to represent that City in Parliament in 1774, Edmund Burke stated to his constituents, in famous words, his standard of the function and duty of an elected representative in the "deliberative" assembly of a representative system of government and his relation to his constituents as follows:

> "Their wishes ought to have great weight with him; their opinion high respect—But his unbiased opinion, his mature judgment, his enlightened conscience, he ought not to sacrifice to you; to any man or to any set of men living. These

he does not derive from your pleasure —? They are a trust from Providence, for the abuse of which he is deeply answerable. Your representative owes you not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion?

"If government were a matter of will upon any side, yours, without question, ought to be superior? But government and legislation are matters of reason and judgment, and not of inclination?—authoritative instructions; mandates issued, which the member is bound blindly and implicitly to obey, to vote for and argue for, though contrary to the clearest conviction of his judgment and conscience, these are things utterly unknown to the laws of this land and which arise from a fundamental mistake of the whole order of our constitution.

"Parliament is not a Congress of ambassadors from different and hostile interests—but a deliberative assembly—of the whole; where not local purposes, not local prejudices ought to guide, but the general good, resulting from the general reason of the whole; You choose a member indeed; but when you have chosen him, he is not a member of Bristol, but he is a member of Parliament?"

It is common for cynics to sneer or smile, at standards of any kind, even if they believe in them, but, in crises, we are forced to realize that our "glorious heritage" of constitutional representative government was based, not on cynicism, but on standards—high, but not beyond the capacity of public spirited men and women. The men who fought and died in the past, and those who are now fighting are not fighting for a cynical conception of government.

A great American—Grover Cleveland—put in a nutshell Edmund Burke's conception of representative government when he said "public office is a public trust." A great judge once remarked that it was one thing to put something in a nutshell, but quite another to keep it there. However, perhaps, in these critical days, it is worth reminding ourselves, occasionally, of the representative standard of the friend of America in the critical days of the American Revolution—Edmund Burke.

F.W.G.

ACKNOWLEDGMENTS OF DEEDS TAKEN IN ANOTHER STATE

In the history of the Land Court, prepared for the 50th Anniversary of the Court and printed in the Special Number of the "Quarterly" for January 1949 (Vol. XXXIV No. 1) we called attention to a rather curious fact. Although land is the basic asset of the Commonwealth and "marketability" of title of direct concern to every land owner and to every lawyer who has a landowner for a client, yet

"There has always been in the profession a certain amount of uninformed condescension toward conveyancing in general, going back to the time when Lord Chancellor Hardwicke [in the middle of the 18th Century] rebuked Sir Robert Henley, later Lord Chancellor Northington (a good lawyer and a genial three bottle man) for contemptuous remarks about the practice of conveyancers, which Hardwicke [a greater lawyer] regarded as most helpful, as a source of law."

This absurd attitude still persists to some extent, as any one may ascertain by casual conversation. That general practitioners do not share this view was demonstrated by the interest shown at the midwinter meeting of the Association at Northampton last February and at the Massachusetts Lawyers Institute in Plymouth, last June.

In the course of his discussion, at Plymouth, of "Pitfalls in Title Examinations" (printed in the "Quarterly" for September 1950) Mr. Roger Tyler said (at P. 28).

"It has been the practice until recently to accept an acknowledgment outside the Commonwealth taken before a notary of another state who merely affixed his notarial seal, but this has been questioned by a Justice of the Superior Court who ruled that title depending on a deed acknowledged outside the Commonwealth by a notary with a notarial seal, but no certificate under Section 33 (of G.L. Chapter 183) was defective because the deed was not properly of record. This seems a mistaken and very unfortunate ruling especially in view of established practice."

The ruling seems so mistaken and so unfortunate, as demonstrated by the telephone inquiries that we have received or have knowledge of, that we think the unexpected ghost, threat-

ening security of titles and unnecessary litigation, should be exorcised by the story of the facts and law. We respectfully submit that the ruling is contrary to the general rule of law and practice, recognized by statute, apparently ever since 1783, except for one year between 1894 and 1895. What happened?

Taking an acknowledgment is a "ministerial" and not a judicial act; its purpose is to entitle the document to record; the certificate of the notary is evidence, but open to contradiction. See *McOuatt* v. *McOuatt,* 320 Mass. 410, at p. 413.

In *Carpenter* v. *Dexter,* 8 Wallace 513 Mr. Justice Field, for the Supreme Court of the United States said

"Unless the statute requires evidence of official character to accompany the official act which it authorizes, none is necessary."

This case is cited, as stating the general rule in 1 American Jurisprudence, 303.

This general rule was always followed in Massachusetts, and no certificate of authority was ever required, until the passage of Chapter 253 of 1894, Section 4. As shown by its title this act was adopted as a "uniform" act and, as sometimes happens, "uniform" acts, by some provision of detail, may cause more harm than good in *some* states. Section 4 caused trouble enough, in one year, so that Chapter 460 of 1895 was passed, to counteract it, reading:

"Section 1. Nothing contained in chapter two hundred and fifty-three of the acts of the year eighteen hundred and ninety-four shall be construed to prevent the acknowledgment of conveyances and other written instruments in the form and manner lawfully used before the passage of said act; *or the recording of conveyances and other written instruments so acknowledged without formalities other than those required before the passage of said act.*

"Section 2. This act shall take effect upon its passage. (Approved June 4, 1895)".

These two statutes came before the Court in *Close* v. *Martin* 208 Mass. 236. The Court said (at p. 240)

"It was provided by St. 1895, c. 460, that nothing contained in St. 1894, c. 253, should prevent the acknowledgment of conveyances in the form and manner lawfully used before the passage of that act. Before the passage of that act it was

enough that the deed, if acknowledged in another state, was acknowledged before a justice of the peace. Pub. Sts. C. 120, 6. *It was not necessary to append to the acknowledgment a certificate that the person taking it was a justice of the peace.*"

The law, as thus stated by the Court, has been the law followed in practice ever since and is recognized by G. L. Chapter 183 Section 30(b) as follows:

"b) If without the commonwealth, in any state, territory, district or dependence of the United States, before a justice of the peace, notary public, magistrate of commissioner appointed therefor by the governor of this commonwealth, or, if a certificate of authority in the form prescribed by section thirty-three is attached thereto, before any other officer therein authorized to take acknowledgments of deeds."

This governing clause also appears in the Tercentenary Edition (which is merely a new edition never enacted.) *Section 33 referred to does not apply to the first part of Section 30(b).*

Any other view would, not only throw unwarranted doubt on many titles of record, but, as Mr. Tyler points out, would fill up the registries with waste paper to be recorded at length and stored at the public expense in conflict with the purpose of the short form of deeds act of 1912. We know of one lawyer who protects the public from that burden when he receives a deed, acknowledged with a long certificate of authority of the notary attached, by tearing it off before he records the instrument.

We submit that he is right in so doing.

Mr. Tyler suggests that the revision commissioners should "clarify" the statute. We respectfully suggest that the commissioners should leave it alone, because *Close* v. *Martin* and Section 30(b) seem to make the law perfectly clear and unnecessary amendments are legal nuisances which are apt to raise unnecessary doubts. The inadvertent ruling of one trial judge is not a sufficient reason for changing the statutes.

The opening note to Section 30 of Chapter 183 in the Annotated Edition of the General laws is misleading, although referring to *Close* v. *Martin,* and is, perhaps, the explanation of the mistaken ruling of the Superior Court referred to by Mr. Tyler.

If any one wishes to test, or challenge, the views herein expressed we invite an answer, if there is one, and suggest that they, first, read and compare carefully, every statute since 1783 referred to under Section 30 in the Annotated Laws and also the note to Section 13 of Chapter 59 of the Revised Statutes of 1836, in the commonly forgotten report of the Commissioners on the Revised Statutes.

We hope this discussion will help to clarify conveyancing opinion, which governs "marketability" of title and that this question will not be raised again in the Superior or any other court. Nevertheless it probably will be, and, perhaps, the discussion may help then. The note to Section 30 in the Annotated Laws should certainly be revised to fit the law.

F.W.G.

PROPERTY OWNERS—BEWARE!

*by Joseph B. Abrams**

The owner of real estate makes a contract with an independent contractor whereby the latter agrees to remove a porch which is in a dilapidated condition. The contractor is in exclusive control of the work. His employees negligently drop a heavy beam on the head of one to whom there is owed a duty of reasonable care. Suit is brought against the contractor and also the owner. You represent the owner who seeks your advice as to liability on his part. What are you going to tell him?

In the good old days before there was any such thing as a Restatement of the law of torts to worry about, most lawyers would probably have advised their client that the employer of an independent contractor was not subject to liability for bodily harm caused by the negligence of the independent contractor.

Of course there were exceptions to this rule of law if the work being done was "inherently dangerous". Blasting[1],

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* A.B. Harvard, LL.B. Harvard Law School.

[1] *Wetherbee* v. *Partridge*, 175 Mass. 185.

fumigating by a poisonous gas[2], use of a poisonous spray[3] were examples of "inherently dangerous" work.

But repairing a chimney[4], washing windows[5] and painting shutters[6] were held to be not "inherently dangerous", so the owner was not responsible for the negligence of an independent contractor.

In what category are we to put the porch case? The wooden beam that hit the victim weighed fifty pounds. Does the weight of the beam make the work "inherently dangerous"?

The opinion in *Whalen, Admx.* v. *Shivek* (and two companion cases)[7], deserves careful study.

In that case the owner leased a one-story building, formerly used as a garage, to a tenant who intended to use it for a machine shop. There was a parapet in an obvious state of disrepair consisting of cement blocks weighing about 200 pounds each. This parapet was adjacent to a public sidewalk and the plaintiff's intestate was killed by being struck by one of these blocks due to the negligence of the independent contractor's employees.

As lawyers we have no difficulty in holding the independent contractor liable for the negligence of his servants. But what about his employer, the lessee, who had entered into the contract with him to do the work? The Supreme Judicial Court held him liable also, on the ground that the employer was answerable for the failure of the independent contractor to take such precautions to prevent injury as the nature and circumstances of the work required, where, as in this case, injury to others would probably result unless such precautions were taken.

The opinion distinguishes between the case of *Boomer* v. *Wilbur*, 176 Mass. 482, (where it was held there was no liability on the employer of an independent contractor for the negligent dropping of a brick on a sidewalk while the independent contractor was repairing a chimney), and the case of

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[2] *Ferguson* v. *Ashkenazy*, 307 Mass. 197.
[3] *Pannella* v. *Reilly*, 304 Mass. 172.
[4] *Boomer* v. *Wilbur*, 176 Mass. 482.
[5] *Pickett* v. *Waldorf System, Inc.*, 241 Mass. 569.
[6] *Davis* v. *John L. Whiting & Son Co.*, 201 Mass. 91.
[7] *Whalen* v. *Rossano Construction Company, Inc.* and *Whalen* v. *Modern Die & Machine Company*, 1950 Advance Sheets, page 833.

removing a parapet consisting of 200-pound blocks. What happened in the chimney case, said the Court, was a "mere detail of the work" arising from negligence which was not a probable consequence of the work.

Where does this attempted distinction leave the property owner? When is negligence a "probable consequence of the work" and when is it not? Is it not more to be anticipated that a brick weighing four pounds will be negligently dropped than a cement block weighing two hundred pounds? Of course we know that cases are decided many times on differences in degree, but where does this leave the lawyer? Are we to decide cases by the weight of the objects dropped on the heads of the innocent pedestrians? In what category are we then to put the fifty-pound beam dropped from the porch?

Take another illustration. Suppose a rigger is hired for a certain sum to move a heavy safe from one law office to another. The safe crashes to the sidewalk and kills an innocent pedestrian. If proper precautions had not been taken, is the lawyer liable, as well as the rigger?

Suppose we substitute Prosser's book on torts for the heavy safe. The book is dropped instead of the safe, but with the same deadly effect. Is the lawyer liable?

In the Whalen case the court held both the independent contractor and his employer, the lessee, liable. How about the owner? He also was held liable on the theory of nuisance, i.e., the condition of the parapet was such as to constitute a nuisance and a source of danger to persons using the sidewalk below, and the owner knew or should have known of that condition. The lease had divested the owner of all control, but the court held that the covenants in the lease requiring the lessee to repair or remedy the nuisance or to save the landlord harmless from its consequences, could not save the landlord from liability to third persons in a case like the present, where the nuisance existed at the time of the letting. "It is one thing", says the court, "to let premises on which there is no nuisance, and quite another to let premises on which a nuisance already exists. . . . We think it would be contrary to sound public policy to allow a landlord to avoid liability in such a case merely because his tenant had agreed to protect him against it."

Well, there you have it. Everybody was held liable in this case—the lessor, the lessee, and the independent contractor. So several lessons can be drawn from the opinion. So far as the plaintiff's lawyer is concerned, he should always add a count in nuisance to his negligence counts. What constitutes a "nuisance" is something upon which very able judges and lawyers have differed in the past and will again in the future. The owner was held liable in the Whalen case because the attorney had two counts in the declaration based on nuisance in addition to two counts based on negligence. The latter were no good as to the owner but the nuisance counts were good.

The next lesson to be drawn is that in cases of this kind where it is sometimes a question as to the financial responsibility of the independent contractor, both the lessor and lessee should be joined as defendants, since as we have seen, all three may be liable.

The owners or tenants must see to it that they have the work done by a financially responsible contractor, and in addition, protect themselves by insurance wherever possible. Since real estate is always becoming dilapidated and out of repair, and since accidents do happen, the danger of being called upon to answer for the negligence of an independent contractor is real and probable. One can no longer sit back smugly and assure one's client that the covenants in a lease protect him from liability. Nor can one predict what work will be held to be "inherently dangerous", so as to subject the employer of an independent contractor to liability. As the court points out, ". . . the general rule (of non liability) is 'now primarily important as a preamble to the catalog of its exceptions'."[8]

We may yet live to see the day when the exceptions will so overwhelm the rule that the rule itself will be abandoned, and the employer of an independent contractor will be held liable in all cases for the negligence of the independent contractor, regardless of the nature of the work.

We have seen a similar situation in regard to the liability of a manufacturer for negligence regardless of privity of

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[8] *Pacific Fire Insurance Co.* v. *Kenny Boiler & Manufacturing Co.*, 201 Minn. 500, 503.

contract[9]. The exceptions to the rule of non-liability in the negligence cases came so thick and fast that the rule was finally abandoned. And while we do not wholly agree with Mr. Dooley that "the Supreme Court follows the iliction returns", we do know that the Supreme Judicial Court does study the various Restatements of the law, which attempt to formulate the best and most advanced legal thought of the country.

So now you know how to advise the client in the porch case. What did you say?

TAX IMPLICATIONS OF ALIMONY AND SUPPORT AGREEMENTS AND DECREES

by Philip J. Woodward

Tax rules have always been particularly difficult to apply to marital and family situations. The satisfaction of marital obligations and similar obligations to support children do not fit into the same pattern as ordinary business or investment transactions. For example, we recognize without even bothering to analyze that when a man gives his wife an allowance to run their house and for her own needs that she is not receiving "income"; likewise, we do not feel any need to report as a taxable gift the fur coat which he buys for her. Much more difficult, however, is the status of alimony and separate support agreements and decrees and trusts to impliment the same.

From the standpoint of creating an equitable tax structure, these financial transactions in the marital sphere involve clear-cut transfers or enforceable legal obligations on the one hand and, on the other hand, transactions within the family are both unique and particularly susceptible to abuse by manipulation. Hence, it is not surprising that some of the rules are still not clear. In addition, the picture is complicated by the tendency of the parties and their lawyers to overlook even the more obvious tax problems when they work out marital settle-

[9] *Carter* v. *Yardley*, 319 Mass. 92.

ments. This brief article is intended to serve as a reminder of some of these problems and of methods of dealing with the same.

Massachusetts Income Tax

For convenience in discussion, I will assume, except where I expressly state otherwise, that any payments or settlements are being made by the husband to or for the benefit of his wife or ex-wife. By far the most common problem arises in connection with the income tax status of the parties. Generally, the question is, are the payments taxable income to the wife and are they deductible by the husband.

As is so often the case in considering the Massachusetts income tax, we receive no help from the statute or the decisions and there are, of course, no longer any official regulations. The practice is well established, however, that simple payments by a husband to his wife as alimony or separate support are neither deductible by the husband nor taxable income to the wife. Where the payments come from a trust, however, the regular trust rules would apply, with the tax being paid by the trustee on behalf of the wife as beneficiary.

Federal Income Tax

The Federal income tax situation is now reasonably clear as a result of the alimony amendment in the Revenue Act of 1942, which now appears as Sec. 22(k) and Sec. 23(u) of the Internal Revenue Code. This amendment makes alimony and separate support payments taxable as income to the wife and deductible by the husband under most circumstances. Without going into full detail, the following are some of the more important considerations in applying the above rule:

1. There must be a court decree of separate support or divorce before the above rule applies. Only payments made after the decree are deductible by the husband. *Cox* v. *Commissioner,* 176 Fed. (2d) 226. Our decree *nisi* is considered sufficient to satisfy the statute without waiting for it to become final.
2. Not only must there be a decree, but the provision for payments must be made in accordance with provisions contained either in the decree itself or in a written in-

strument "incident thereto". *Brighthill,* 8 TCM 112. Moreover, if one is to rely on a written agreement, it must have been executed either prior to or at the same time as the decree. This calls for considerable care in the event of any subsequent modifications of the agreement. As nearly as one can tell from the decisions so far, any modification which increases the payments will not be effective for tax purposes to the extent of the increase unless either (a) the decree is also modified, or (b) the increase falls within a formula already provided by the original agreement (such as an increase in payment due to an increase in the salary of the husband as contemplated by the original agreement). See *Miriam C. Walsh,* 11 TC 1093; *F. S. Danwalter,* 9 TC 580; *Murray* v. *Commissioner,* 174 Fed. (2d) 816.

3. The payments must be periodic. Lump sum settlement payments in installments covering less than ten years are not recognized unless there is a lump sum transfer in trust for the wife. In these trust situations the income of the trust is taxable to the wife assuming that the other formal requirements already mentioned are complied with.
4. Where payments are made for both wife and children, the whole amount is deductible by the husband and taxable to the wife except where the portion allocable to the wife is specifically designated. Hence, the phrasing of the agreement can be quite important in this respect. If the payments are fully taxable to the wife, the children become her dependents rather than those of her husband for tax purposes, assuming that other requirements of dependency are satisfied.
5. Payment of legal expenses in connection with alimony or support proceedings may be deductible, at least if made by the wife. *Elsie B. Gale,* 13 TC 661; *Barbara B. Le Mond,* 13 TC 670.

Federal Gift Tax

Only rarely will the gift tax be a factor in an alimony or separate support settlement. Such a case was *Barnard* v.

Commissioner, 176 Fed. (2d) 233, where a wife made a very substantial settlement on her husband in connection with a divorce. The court held there was a taxable gift both because it found no legal obligation by a wife to make such a payment in discharge of any duty to support or the like and also, because the agreement to pay was not properly incorporated in the decree. See also *Merrill* v. *Fales,* 324 U.S. 308 and *Krause* v. *Yoke,* 89 F. Supp. 91.

The exact rule under the Gift Tax is none too clear. Although there is no question that a settlement in discharge of a legal obligation to support a spouse or a child is exempt from the gift tax, there is some question of what constitutes a legal duty within the meaning of this rule. An example would be a settlement for a child over the age of 21, or for a child who was nearly 21 but with the amount substantially more than would normally be required for the brief remaining period of minority.

There is some authority for the proposition that a payment made in accordance with a decree or judgment will be exempt from gift tax even though the same payment would be taxable if made in accordance with an agreement having an existence separate from a decree. This seems to be on the theory that a legal obligation has been created by court action which thereby negatives any taxable gift. *Commissioner* v. *Converse,* 163 Fed. (2d) 131; *Barnard* v. *Commissioner,* 176 Fed. (2d) 233; *Harris* v. *Commissioner,* 178 Fed. (2d) 861.

Federal Estate Tax

What about an alimony or support settlement which calls for payments continued after the death of the husband? Will these payments be deductible by the husband's estate for the purpose of the Federal estate tax? Once again we come back to the question of whether the payments following death are in satisfaction of a legal obligation. Moreover, there is some authority for the conclusion that the obligation to make the payment must be embodied in a decree. *Com'r* v. *State Street Trust Co.,* 122 Fed. (2d) 618. One case has held that the deduction is not allowable where made in accordance with an agreement not incorporated and *merged* in a decree. *Meyer* v. *Com'r,* 110 Fed. (2d) 929.

For an interesting variation of the problem see *Estate of P. M. Maresi,* 156 Fed. (2d) 929 where the court allowed a deduction for alimony payments due from the estate of the decedent under a decree even though the obligation was to terminate in the event of remarriage. An actuarial computation was made based on tables relating to probability of remarriage.

I am not familiar with any rulings or established practice in the application of the Massachusetts inheritance tax to such situations and so I will make no comment on the problem.

Suggested Procedures

From the foregoing discussion, it is apparent that most of the income tax problems can be adequately handled by taking a few precautions. Probably the most dangerous point lies in subsequent modification of agreements. The rule which appears to disallow as deductions any increase in payments not specifically contemplated by the agreement or decree seems rather harsh. This difficulty can be surmounted, of course, by a subsequent modification of the decree as well as the agreement.

The much more difficult, though rare, problems arise in connection with the gift and estate tax. Here we have relatively little to guide us, but such precedents as are available indicate that it is probably necessary to have the agreement incorporated in a decree if the payments are to be deductible. Moreover, there is some indication that the agreement must be so merged in the decree that it has no independent significance, at least where there is some doubt of the legal duty to support separate from a court decree. This raises a serious issue, since many lawyers believe that there is a real advantage in having an agreement which is enforcible outside of the decree, particularly where there may be occasion to try to enforce it in another state. There will be situations where this latter consideration outweighs any possible gift or estate tax problem. It should be borne in mind, however, that in those situations where gift or estate taxes may prove to be an important factor there may be a real advantage in having any agreement merged in a decree.